IN THE HIGH COURT OF JUDICATURE AT BOMBAY

**WRIT PETITION NO.2450 OF 2005**

(ORDINARY ORIGINAL CIVIL JURISDICTION)

Indian Hotel & Restaurants )

Association (AHAR), an )

Association duly registered )

under the provisions of )

the Trade Unions Act,bearing )

No.BB-11-7920, having its )

office at B-2, Wadala Shri Ram)

Industrial Estate, Ground )

Floor, G.D. Ambedkar Road, )

Near Wadala Telephone Exchange)

Wadala, Mumbai-400 031. )

2.Jagdish V. Shetty, General )

Secretary ofIndian Hotel & )

Restaurants ) Association )

(AHAR), an ) Association duly )

registered under the provisions )

of the Trade Unions Act, )

bearing No.BY-11-7920, having )

its office ) at B-2, Wadala )

Shri Ram Industrial Estate, )

Ground Floor, G.D. Ambedkar )

Road, Near Wadala Telephone)

Exchange, Wadala,Mumbai-400 031)..PETITIONERS

Versus

1.The State of Maharashtra )

through the Hon'ble Minister, )

Home Affairs, Home Department, )

Mantralaya, Mumbai-400 032. )

2.The Commissioner of Police, )

having his office at Opp.Crawford)

Market, Mumbai-1. )..RESPONDENTS

**WITH**

**WRIT PETITION LODGING NO.2052 OF 2005**

(ORDINARY ORIGINAL CIVIL JURISDICTION)

Bharatiya Bargirls Union, )

a Registered Trade Union, )

through its Honorary President )

Varsha Kale, having its office )

at D-3, 303, Pancharatna )

Soc., Anand Nagar, Panduranga )

Wadi, Manpada Road, Dombivili )

(East)0421 201. )..PETITIONER

Versus

1.The State of Maharashtra )

through the Hon'ble Minister, )

Home Affairs, Home Department, )

Mantralaya, Mumbai-400 032. )

2.The Commissioner of Police, )

having his office at Opp.Crawford)

Mumbai-1. )..RESPONDENTS

**WITH**

**WRIT PETITION LODGING NO.2338 OF 2005**

(ORDINARY ORIGINAL CIVIL JURISDICTION)

1.Forum Against Oppression of )
Women, 29, Bhatia Building, )
Babrekar Marg, Off. Gokhale )
Road (North), Dadar (West), )
Mumbai-400 028. )
2.Aawaz E Niswan, having their )
office at Jain High School, )
84, Hazrat Abbas Galli, Dongri, )
Mumbai. )
3.Women's Centre having their )
office at 104B, Sunrise Apts., )
Nehru Rd., Vakola, Santacruz )
(E), Mumbai-400 055. )
4.Akshara, having its office at )
Neelambari 501, Road No.86, )
Gokhale Road, Dadar West, )
Mumbai-400 028. )
5.Womens Action and Research )
Group, 101, Zaithunvilla, Behind)
Air View Building, Near Vakola )
Market, Santacruz (E),Mumbai. )
6.India Centre for Human Rights )

& Law, having its office at )
Jain Schoo, 84, Hazrat Abbas )
Galli, Dongri, Mumbai. )..PETITIONERS

Versus

1.State of Maharashtra )
through the Hon'ble Minister, )
Home Affairs, Home Department, )
Mantralaya, Mumbai-400 032. )
2.The Commissioner of Police, )
having his office at Crawford )
Mumbai-1. )..RESPONDENTS

WITH

WRIT PETITION NO.2587 OF 2005

(ORDINARY ORIGINAL CIVIL JURISDICTION)

1.The Sanmitra Trust, )
Malvani Project, A registered )
Trust having its office )
Karimi Park, Shalimar Apartments)
3/B, 17, Oshiwara Garden Lane, )
Jogeshwari (W)-400 102. )
2.Ekta Self Help Group, )
an unregistered Association )
of Women Bar Dancers through )
their Chairperson having its )
address at, Karimi Part, )

Shalimar Apartments, 3/B, 17 )
Oshiwara Garden Lane, )
Jogeshwari (W), Mumbai-400 102. )..PETITIONERS

Versus

1.State of Maharashtra )
through the Hon'ble Minister, )
Home Affairs, Home Department, )
Mantralaya, Mumbai-400 032. )
2.The Commissioner of Police, )
having his office at Crawford )
Mumbai-1. )
3.Maharashtra State AIDS Control)
Society )
4.Mumbai District AIDS Control )
Society, both Respondent Nos.3 &)
4 have their office at Acworth )
Complex, R.A.Kidwai Marg, )
Wadala,(W), Mumbai-400 031. )
5.National AIDS Control )
Organisation, 9th Floor, )
Chandralok Building, 36, Janpath)
New Delhi-1100 001. )..RESPONDENTS

WITH

WRIT PETITION NO.5503 OF 2005

Ramnath Vishnu Waringe, )

of Pune,Aged 39 years,Proprietor)
of M/s.Hotel Gurudev (Lovebird) )
at Kamhe Phata, Vadgaon, Maval, )
Pune. )..PETITIONER

Versus

1.The State of Maharashtara, )
through the Hon'ble Minister, )
Home Department, Mantralaya, )
Mumbai-400 032. )
2.The Sub-Divisional Magistrate,)
Maval Sub Division, Pune-1. )..RESPONDENTS
3.The District Collector of )
Pune, Pune. )

WITH

WRIT PETITION NO.5504 OF 2005

Ajit Chandrakant Satkar )
of Pune,Aged 29 years,Proprietor )
of M/s.Ajit Motels & Resorts )
Private Limited at Post Kanhe, )
Taluka Maval, Dist. Pune. )..PETITIONER

Versus

1.The State of Maharashtara, )
through the Hon'ble Minister, )
Home Department, Mantralaya, )

Mumbai-400 032. )

2.The Sub-Divisional Magistrate,)

Maval Sub Division, Pune-1. )..RESPONDENTS

3.The District Collector of )

Pune, Pune. )

WITH

CRIMINAL WRIT PETITION NO.1971 OF 2005

(APPELLATE SIDE)

Fight for Rights Bar Owners )

Association c/o.Karishma )

Restaurant and Bar (Through )

its President Shri Manjeetsingh )

s/o.Moolsingh Sethi, aged 57 )

years, Occ. Business, R/o.C/o. )

Karishma Restaurant & Bar, )

Naiagon Gross Road, Dadar (East))

Mumbai-400 014. )..PETITIONER

Versus

1. The Union of India through )

its Ministry,Home Department, )

New Delhi. )

2.The State of Maharashtra, )

(Through its Principal Secretary)

Home Department, Mantralaya, )

Mumbai-32. )

3.The Advocate General of )

Maharashtra, High Court Building)

Annexe, Mumbai. )

4.Shri R.R. Patil, Deputy )

Chief Minister and Home Minister)

of Maharashtra, Mantralaya, )

Mumbai-32. )

5.Shri Vilas Satam, Age 32 years)

Occ. Business Vice President, )

NCP Kurla Unit, Kurla Dist.Thane)

At presently residing at )

Kurla(West), Mumbai-400 070 )

6.Shri Paresh C.Patil @ Majugale)

Aged 45 years, Occ. Interior )

Decorator, C/o. NCP Head Office )

Opp. to Mantralaya, Mumbai-32. )

At present residing at 5th Floor)

Near Sarva Mangal Maryalaya, )

Gangapur Road, Nashik. )..RESPONDENTS

7.Central Bureau of )

Investigation (Through its )

Director) New Delhi. )

8.The Commissioner of Police, )

Mumbai. )

WITH

WRIT PETITION NO.6930 OF 2005

(NAGPUR BENCH)

Smt.Chhayadevi w/o.Suresh )
Jaiswal, Aged about 60 years, )
Occ. Business, Proprietor of )
M/s.Golden Spoon Bar and )
Restaurant, Abhayankar Road, )
Sitabuildi, Nagpur. )...PETITIONER

Versus

1.State of Maharashtra through )
a) Chief Secretary, )
b) Home Secretary, )
Mantralaya, Mumbai. )
2.Commissioner of Police, Nagpur)..RESPONDENTS

WITH

WRIT PETITION NO.6931 OF 2005

(NAGPUR BENCH)

Manoj S/o.Jainarayan Sharma, )
Aged about 36 years, )
Occ. Business, Partner of )
M/s.Lahoree Delux Bar and )
Restaurant, West High Court, )
Dharampeth, Nagpur. )..PETITIONER

Versus

1.State of Maharashtra through )

a) Chief Secretary, )

b) Home Secretary, )

Mantralaya, Mumbai. )

2.Commissioner of Police, )

Nagpur )..RESPONDENTS

Mr. V.R. Manohar, Senior Advocate, with Mr. R.D. Soni, Mrs. Veena B. Thadani and Mr. Vishal B. Thadani for Petitioners in Original Side Writ 2450 of 2005 and Appellate Side Writ Petition No.5503 of 2005 and Writ Petition No.5504 of 2005.

Mr.Aspi Chinoy, Senior Advocate with Mr. A.M. Sethna and Ms. Elavia Agnes for Petitioners in Original Writ Petition Lodg.No.2952 of 2005

Mr. Anand Grover, Senior Advocate with Mr. Prakash Mahadik, for petitioenrs in Original Side Writ Petition No.2587 of 2005

Mr. Mihir Desai for Petitioners in Original Side Writ Petition Lodg. No.2338 of 2005

Mr.S.B. Talekar with Mr. Jagdish G. Reddy for Petitioners in Appellate Side Criminal Writ Petition No.1971 of 2005.

Mr.S.S. Voditel for the Petitioner in Writ Petition No.6930 of 2005 and Writ Petition No.6931 of 2005

Mr. Ravi M. Kadam, Advocate General with Mr. A.A. Kumbhakoni, Associate Advocate General, Mr. R.M. Sawant, Govt. Pleader and Mr. N.P. Deshpande A.G.P. for the State in All Petitions.

Mr. Rafiq A. Dada, Special Counsel with Mr. A.R. Patil, A.G.P. for Respondent No.8 Commissioner of Police in Criminal Writ Petition No.1971 of 2005.

Mr. S.R. Borulkar, Public Prosecutor with Mr. D.S. Mhaispurkar, A.G.P. for Respondent No.2 in Appellate Side Criminal Writ Petition No.1971 of 2005

Mr. V.C. Kotwal, Special Counsel with Mr. P.A. Pol, AGP for Respondent No.4 in Appellate Side Criminal Writ Petition No.1971 of 2005

Mr. R.F. Lambhay for Respondent No.1 and 7 in Appellate Side Criminal Writ Petition No.1971 of 2005

Mr. A.P. Mundargi, Senior Advocate with Mr. M.S. Karnik, for Respondent No.6 in Appellate Side Criminal Writ Petition No.1971 of 2005

Mr. C.J. Sawant, Senior Advocate, with Mr. S.K. Dubey, Mr. A.K. Jalisatgi and Mr. Amol B. Desai for Applicants in Chamber Summons NO.217 of 2005 in Original Side Writ Petition No.2450 of 2005 and in Chamber Summons No.218 of 2005 in Original Side Writ Petition Lodging No.2052 of 2005 and in Civil Application No.2751 of 2005 in Appellate Side Civil Writ Petition No.5503 of 2005

Mr. S.R. Ganbavale and Mr. S.S. Yadav for Applicant in Chamber Summons NO.225/05, Chamber Summons No.226 of 2005 in Original Side Writ Petition No.2450 of 2005 in Chamber Summons No.226 of 2005, Writ Petition Lodging No.2052 of 2005 and in Civil Application No.2752 of 2005 and Civil Application No.2753 of 2005 in Appellate Side Civil Writ Petition No.5504 of 2005.

Mr. A.J. Almeida for Applicant in Chamber Summons No.262 of 2005 in Original Side Writ Petition No.2450 of 2005.

Mr. Ishwarprasad G. Khandehwala, represetnative of Applicant in Chamber Summons No.231 of 2005 in Original Side Writ Petition No.2450 of 2005, Chamber summons No.232 of 2005 in Original Side Writ Petition Lodging No.2052 of 2005, Chamber Summons No.238 of 2005 in Original Side Writ Petition No.2587 of 2005 and Chamber Summons No.233 of 2005 in Original Side Writ Petition Lodging No.2338 of 2005.

**CORAM: F.I. REBELLO &**
**MRS.ROSHAN DALVI, JJ.**

RESERVED ON: 14TH DECEMBER, 2005

PRONOUNCED ON:12TH APRIL,2006.

JUDGMENT (PER F.I. REBELLO, J):

. The challenge in all these petitions is to the constitutional validity of Sections 33A and 33B of the Bombay Police Act, as amended by the Bombay Police (Amendment) Act, 2005. The bill was passed by the Legislative Assembly on 21st July, 2005 and by

the Legislative Council on 23rd July, 2005 and has now come into force. The Sections under challenge may be gainfully reproduced:-

> 33A(1) Notwithstanding anything contained in this Act or the rules made by the Commissioner of Police or the District Magistrate under sub-section (1) of Section 33 for the area under their respective charges, on and from the date of commencement of the Bombay Police (Amendment) Act, 2005,--
>
> (a) holding of a performance of dance, of any kind or type, in any eating house, permit room or beer bar is prohibited;
>
> (b) all performance licences, issued under the aforesaid rules by the Commissioner of Police or the District Magistrate or any other officer, as the case may be, being the Licensing Authority, to hold a dance performance, of any kind or type, in an eating house, performance, of any kind or type, in an eating house, permit room or beer bar shall stand cancelled.
>
> (2)Notwithstanding anything contained in Section 131, any person who holds or causes or permits to be held a dance performance of

any kind or type, in an eating house, permit room or beer bar in contravention of sub-section (1) shall, on conviction, be punished with imprisonment for a term which may extend to three years and with fine which may extend to rupees two lakhs:

Provided that, in the absence of special and adequate reasons to the contrary to be mentioned in the judgment of the Court, such imprisonment shall not be less than three months and fine shall not be less than rupees fifty thousand.

(3) If it is, noticed by the Licensing Authority that any person, whose performance licence has been cancelled under sub-section (1), holds or causes to be held or permits to hold a dance performance of any kind or type in his eating house, permit room or beer bar, the Licensing Authority shall, notwithstanding anything contained in the rules framed under section 33, suspend the Certificate of Registration as an eating house and the licence to keep a Place of Public Entertainment (PPEL) issued to a permit room or a beer bar and within a period of 30 days from the date of suspension of the Certificate of Registration and licence,

after giving the licensee a reasonable opportunity of being heard, either withdraw the order of suspending the Certificate of Registration and the licence or cancel the Certificate of Registration and the licence.

(4) A person aggrieved by an order of the Licensing Authority cancelling the Certificate of Registration and the licence under sub-section (3), may, within a period of 30 days from the date of receipt of the order, appeal to the State Government. The decision of the State Government thereon shall be final.

(5)Any person whose performance licence stands cancelled under sub-section (1), may apply to the Licensing Authority, who has granted such licence, for refund of the proportionate licence fee. The Licensing Authority, after making due inquiry shall refund the licence fee on pro-rata basis, within a period of 30 days from the date of the receipt of such application.

(6) The offence punishable under this section shall be cognizable and non-bailable.

33B. Subject to the other provisions of this

Act, or any other law for the time being in force, nothing in section 33A shall apply to the holding of a dance performance in a drama theatre, cinema theatre and auditorium; or sports club or gymkhana, where entry is restricted to its members only, or a three starred or above hotel or in any other establishment or class of establishments, which, having regard to (a) the tourism policy of the Central or State Government for promoting the tourism activities in the State; or (b) cultural activities, the State Government may, by special or general order, specify in this behalf.

Explanation.-- For the purposes of this section, "sports club" or "gymkhana" means an establishment registered as such under the provisions of the Bombay Public Trusts Act, 1950, or the Societies Registration Act, 1860 or the Companies Act, 1956, or any other law for the time being in force."

2. The challenges as formulated in the Writ Petitions, may now be set out before adverting to the facts. Writ Petition No.2450 of 2005 has been filed by the Indian Hotel & Restaurant Association (AHAR) and Shri J.V. Shetty, General Secretary. AHAR is an Association of various hotel owners and bar owners

and/or conductors of the same, who carry on business of running restaurants and bars in Mumbai. The grounds of challenge to the constitutional validity of the Act, and the various other contentions raised in Writ Petition No.2450 of 2005, may be summarised as under:-

(1) Maharashtra Act No.35 of 2005 is not applicable to the petitioners members;

(2) The amendment violates Article 19(1)(g) of the Constitution of India by imposing restrictions by way of total prohibition on the petitioners fundamental right to practice any profession or to carry on any occupation, trade or business;

(3) Section 33B exempts certain establishments from the ban imposed by Section 33A; The amended Section 33A is violative of Article 14 of the Constitution of India;

(4) Affidavit in reply dated 1st October, 2005 does not comply with the provisions of Order 19 Rule 3 of the Code of Civil Procedure. Hence the contentions in the return filed being based on mere hearsay and being without personal knowledge cannot be

relied upon or admitted in evidence;

(5) Material portions of the petition have not been denied by the respondents and consequently are deemed to have been admitted. To the extent contentions have not been controverted, the petition will have to proceed based on uncontroverted facts in the petition. The allegations about trafficking, showering of money by customers, vulgarity and immorality have been made without any personal knowledge and/or investigation being carried out by the Government. The allegations about exploitation of girls or trafficking have appeared for the first time in the return filed by the Government. The statement of objects and reasons does not refer to trafficking.

. The challenges in W.P. No. 5503/20045 and 5504/2004 are similar.

3. Writ Petition Lodging No.2052 of 2005 is filed by Bharatiya Bargirls Union, a registered trade union bearing No.Kamgar Upa Ayuktha/Thane/945/2004 under the Trade Union Act. It is represented by Ms. Varsha Kale, Honorary President. It claims a membership of 5000, who work as bar girls in different parts of Maharashtra. It is their

contention that there are approximately 75,000 women working in around 2500 bars and hotels in or around Mumbai city as well as in other districts of Maharashtra. The principal contentions as urged are that:-

(1)the amendment is violative of the right of the bar girls to carry on an occupation or profession within the meaning of Article 19(1)(g) of the Constitution of India. The restriction amounts to a total prohibition and consequently is violative of the fundamental rights to carry on an occupation or profession.

(2) The impugned amendment is arbitrary and discriminatory in as much as it permits performance of dance in a drama theatre, cinema theatre and auditorium or sports club or gymkhana or three starred and above hotel, while completely prohibiting the same in an eating house, permit room or beer bar. The classification created has no reasonable nexus to the aims and objects it is supposed to achieve and is not founded on any intelligible differentia, having a nexus with the object sought to be achieved, namely prohibiting dancing in an eating house, beer bar and permit room and consequently is

violative of article 14 of the Constitution of India.

4. In Writ Petition Lodging No.2338 of 2005, six petitioners are co-petitioners. The petitioner No.1 is the Forum Against Oppression of Women (FAOW), claiming to be an autonomous, voluntary, non-funded group, working on women's issues for the last 25 years. FAOW, as the petitioner's No.1 abbreviated name is known, is a part of the National Networking of Autonomous Women's Groups and has been organising and participating in six National Conferences of Women's Movements in India. It functions with a discussion and campaign group, actively networking and campaigning around all issues concerning discrimination against women and other related activities.

. The petitioner No.2 is Aawaaz-e-Niswan (AEN), a registered women's organisation dedicated towards fighting injustices inflicted upon women and has been in existence for 17 years. AEN grew from the need for a space for Muslim women to come together and share their experiences.

. The petitioner No.3 emerged out of the women's movement in the City of Mumbai in the year 1980 and is a registered public trust. It was set up to further the cause of women's rights and to make

society aware of the oppressions suffered by women of different sections.

. The petitioner No.4 is known as Akshara and has been functioning since 1980s and grew out of the 1980s women's movement's campaigns against rape and dowry. Their objective is in changing society by changing people and encouraging collective functioning.

. Petitioner No.5, the Women's Research and Action Group (WRAG) is a group of committed women working towards the promotion of the social and legal status of women from marginalized, disadvantaged, unrepresented and under-represented communities. It was founded in Mumbai in April, 1993 and is registered as a public trust.

. The Petitioner No.6 is the India Centre for Human Rights and Law (ICHRL) and registered under the Bombay Public Trust Act. It works among the most vulnerable and marginalized people to ensure their access to rights and is a collective of lawyers and activists.

. Petitioners have raised the following contentions.(1) The amendment violates the right to life, livelihood of bar dancers as set out under Article 21 of the Constitution of India while

prohibiting dancing in eating house, beer bars and permit rooms no rehabilitation or compensation has been provided under the amendments or any other policies. (2) The amendment is violative of the bar dancers right to an occupation or profession. The restriction imposed is unreasonable and the respondents have failed to produce material to show that the restriction falls within permissible restrictions.(3) The amendment is violative of Article 14 of the Constitution of India as there is hostile discrimination between dancers in various establishments.(4) The amendment is violative of the rights of the bar dangers right to freedom of expression. The prohibition sought to be imposed on the grounds of obscenity, decency and morality in the absence of the State discharging its burden amounts to an unreasonable restriction.

5. Writ Petition No.2587 of 2005 is by two petitioners. Petitioner No.1 is a trust registered under the Public Trust Act and has been working for many years with sex workers in Malvani area of Malad in Mumbai providing HIV/AIDS and S.T.D. related services like condom promotion, setting up of clinics, etc. They have initiated 10 self groups with each group having 10 bar dancers. The petitioner No.2 is the Ekta Self Group consisting of 10 bar dancers. Their principal contentions may be set out as under:-

(i) Section 33A and 33B is violative of Article 19(1)(a) and not protected by Article 19(2) of the Constitution.

(ii) The prohibition of all types of dancing whether vulgar or not is ipso facto violative of Article 19(1)(g) and imposes a complete ban on people choosing dancing in dance bars as an occupation and cannot be construed as a reasonable restriction under Article 19(6) of the Constitution.

(iii) Clubbing of all forms of dance performed in eating house, beer bars and permit rooms whether decent or indecent in one class is violative of Article 14 of the Constitution of India. Secondly dividing the establishments into those covered under Section 33A on the one hand and on the other those excluded under Section 33B, makes the classification unreasonable and not based on an intelligible differentia and having no nexus with the object sought to be achieved. The object for the exemption provided under Section 33B is for holding dance performance in sports club, gymkhana and three starred and above hotel by renowned national and international artists having acquired skill

in western dance form. The respondents have failed to show how the establishments exempted under Section 33B can have only non-obscene, decent, non-vulgar dance performance and why the dance performance in the establishments prohibited under Section 33A cannot be decent.

(iv) Dancing is a legitimate source of livelihood. The impugned amendment has deprived the bar dancers of their right to carry on a profession of their choice and deprives them of their legitimate right of livelihood. The impugned amendment does not meet the test of substantive fairness. It does not provide for any alternative employment or occupation for the dancers much less does it make any alternate profession as is required to be made by the State as far as their right to livelihood is concerned. Prohibiting dancing in an eating house, beer bar and permit room is violative of article 14 of the Constitution of India. The amendment also does not meet the test of procedural fairness, as it imposes a blanket ban on all dance performances in dance bars without providing a procedure under which their fundamental rights to earn a livelihood is assured and also protection of the other

fundamental rights guaranteed under Article 19. The amendment depriving the bar dancers their right to livelihood has put them in a position where they might, out of necessity, have to engage in unprotected sex work. Thus they would be highly vulnerable to contact sexually transmitted diseases including HIV.

(v)The right to livelihood under Article 21 of the Constitution includes the right to health. The prohibition imposed by Section 33A is, therefore, violative of their health guaranteed by Article 21 of the Constitution. Section 33A and 33B cannot be construed as reasonable restriction under Article 19(6) of the Constitution. Dancing is not "res-extra commercium" whereas liquor has been held to be "res-extra commercium". The restriction, therefore, imposed in the establishment against dancing and permitting the sale of liquor cannot be construed as reasonable restriction as it violates the right of the bar dancers to practice an occupation or profession. If the object was to prohibit vulgar dancing then by prohibiting all types of dancing, the amendment violates Article 19(1)(g) of the Constitution of India.

(vi). The prohibition of dancing in eating

house, beer bar and permit rooms under Section 33A is violative of the right of the bar dancers to express themselves by dancing. The restriction imposed is not reasonable because no opportunity is provided to the person against whom an order is made to have the same removed by asking that it could not and should not have been made. The restriction could only have been imposed on the ground of decency, morality and public order. The onus of proving the restriction as reasonable was on the State. The State has failed to discharge that burden. The prohibition, therefore, is not protected by Article 19(2) of the Constitution of India.

(vii) Article 15(1) of the Constitution sets out that the State shall not discriminate against any citizen on grounds only of religion, race, caste, sex, place of birth or any of them. Women constitute an overwhelming majority of bar dancers. The effect of Section 33A is to infringe the fundamental right under Articles 19(1)(a), 19(1)(g), 21 and 14 of the Constitution. The effect of the State action is brought about by a distinction based on a prohibited ground and as such constitutes discrimination on a prohibited ground. The impugned amendment

imposes disproportionate impact on women on the basis of their sex. It, therefore, constitutes discrimination on the ground of sex under Article 15, despite being couched in facially neutral language.

6. Criminal Writ Petition No.1971 of 2005 is by the Association of Dance Bar Owners duly registered under the Trade Union Act, 1926. It is their contention that they are a non-political service organisation, aimed at providing economic and social welfare of its members including its employees. The most important objective is to promote and protect the interest of its members engaged in hotel industry and dance bars. They have as members 344 dance bars. The challenge in the petition to Section 33A of the Bombay Police Act, 2005 may be summarised as under:-

(I) Section 33A of the Bombay Police Act 2005 does not fall within the legislative competence of the State Legislature as it is enacted in respect of an entry in the VIIth Schedule on which the State was incompetent to legislate.

(II) The subject of the legislation is already covered by Central Legislation. Once Parliament has enacted laws on the same subject including Indian Penal Code, Immoral

Traffic (Prevention) Act, 1956 Juvenile Justice Act and the Code of Criminal Procedure so as to prevent obscenity, indecency, depravity or immorality as well as exploitation of women including minor girls the field is already occupied. Therefore, to the extent that the State Act impinges on Central Laws already in force, the said law is non-est being repugnant to the Central Act.

(III) Section 33A amounts to a colourable exercise of power. The State Legislature by inserting Section 33A under the guise of public order has impliedly amended Section 294 of the Indian Penal Code. The State Legislature although had a power to amend Section 294, such power could not have been exercised, unless Section 294 of I.P.C. itself is amended and the amendment had received the assent of the President. The amendment, therefore, amounts to colourable exercise of power.

(IV). The power to legislate must exist in the State Legislature and the same cannot be arrogated to itself by usurping the law making power of Parliament. If the exercise of Constitutional power conferred on the

State Legislature is for extraneous reasons and/or for ulterior motive, it is nothing but sheer abuse of power or fraud on power.

(V). Implementation of International Convention on Immoral Trafficking in Women and Girls is within the exclusive domain of Parliament within the meaning of Article 253 and Entry No.14 of List 1 of VIIth Schedule. If, therefore, it is the contention of the State that the amendment was brought about to implement International Convention on Prevention of Women Trafficking it was beyond the competence of the State Legislature and consequently Section 33A and 33B are unconstitutional.

(VI) Section 33A discriminates between artists i.e. girls dancing in bars and Thamasha theatres and at the same time discriminates between viewers visiting dance bars and Thamasha performances. Although the performance of dance is prohibited in dance bars such an activity, howsoever vulgar and indecent, can go on in Thamasha theatres. Dance in three starred and above hotel and discos are not prohibited. The same girl may dance either in Thamasha theatre or any other exempted place. Dance performance in such

place is neither prohibited nor made punishable. Section 33A is, therefore, arbitrary, artificial or evasive and in any case is based on no intelligible differentia which distinguishes persons visiting dance bars on one hand and Thamasha theatre, three starred and above hotel on the other. Similar distinction between dance bars on one hand and Thamasha theatres, three starred and above hotel is again based on no intelligible differentia. The basis of classification between a person visiting dance bars, Thamasha theatre and a person visiting three starred and above hotel as well as places such as dance bar on the one hand and Thamasha theatre on the other hand has no nexus with the object sought to be achieved by the amendment of the Bombay Police Act. The classification is artificial and has no rational or reasonable nexus with the object sought to be achieved.

(VI). Section 33A(2) in as much as it imposes restrictions on the Court in sentencing, interferes with the independence of the judiciary (AIR 1999 S,.C. 3265) and, is, therefore, violative of the basic features of the constitution.

(VII). The statement of the President of the petitioner Shri Manjeetsingh as recorded by the Police discloses an offence against respondent No.4 who is the Deputy Chief Minister and Home Minister of the State of Maharashtra. It should be handed over to Central Bureau of Investigation and the respondent No.7 be directed to register offence against respondents 4 to 6 and to carry out further investigation in regard to the demand of gratification of Rs.12.00 crore and to complete the same within a specified time limit.

7. Writ Petition No.6930 of 2005 and 6931 of 2005 are by the Proprietors of two establishments who are affected by introduction of Sections 33A and 33B to the Bombay Police Act. Their challenges to the amendments are as under:-

I. That the prohibition imposed on dancing in eating house, beer bars and permit rooms amounts to an unreasonable restriction on the petitioners right to carry on trade or business under Article 19(1)(g) of the Constitution of India.

II. The amendment prohibiting the petitioner from having dance performance in its

establishment amounts to infringement of the petitioners right to life under Article 21 of the Constitution of India.

III. The classification of establishment into eating house, permit rooms and beer bars on the one hand where dancing is totally prohibited and exclusion of three starred hotels and above disco lounges, gymkhana, sports club on the other hand is unreasonable in as much as the classification does not have nexus with the object, namely of prohibiting dancing in eating house, beer bar and permit room and is, therefore, violative of Article 14 of the Constitution of India.

8. From the pleadings and the submissions made, the common challenges that are required to be considered can be formulated as under:-

(a) Was the amendment, within the competence of the State Legislature? Further, is the subject matter of the amendment already covered by laws enacted by the Parliament under List III and if so is Section 33A repugnant to the law made by the Parliament, considering Article 246 of the Constitution of India?

(b) Does the proviso to Section 33A (2) amount to interference with the independence of the judiciary which is a basic feature of the Constitution and consequently void?

(c) Should the affidavit dated 1st October, 2005 filed by Youraj Laxman Waghmare having not complied with the provisions of Order 19 Rule 3 of the C.P.C. be rejected?

(d) Does Maharashtra Act 35 of 2005 not apply to an 'eating house' and consequently not applicable to the petitioners establishments as submitted in Writ Petition No.2450 of 2005?

(e) Is Section 33A and consequently Section 33-B violative of Article 14 of the Constitution of India and consequently void?

(f) Is Section 33A violative of Article 15 of the Constitution of India and consequently void?

(g) Does the prohibition imposed, amount to an unreasonable restriction of freedom of speech and expression guaranteed by Article 19(1)(a) of the Constitution of India?

(h) Does the amendment amount to a total prohibition on the bar owners, carrying on their trade or business; Similarly, does the amendment amount to total prohibition on the bar girls carrying on their profession and or occupation and hence violative of their fundamental right under Article 19(1)(g)?

(i) If the prohibition amounts to a restriction, is it a reasonable restriction within the meaning of Article 19(6) of the Constitution of India?

(j) Is the amendment violative of the bar dancers right to life, which includes livelihood and protected by Article 21 of the Constitution of India?

(k) Have Petitioenrs in Criminal W.P. No. 1971/2005 have made out a case for referring the matter to C.B.I.?

Parties have relied on several judgments. We have adverted to them, to the extent necessary.

9. Before we discuss the relevant issues we may note, that each freedom has different dimensions and merely because limits of interference with one freedom is satisfied, the law is not free from the

necessity to meet the challenges of the other freedoms. When the petitioners allege violation of various fundamental rights, the test to be applied is the direct and inevitable consequence and effect of the impugned State action on the fundamental rights, of the petitioners. It is possible that in a given case the pith and substance of the State action may deal with a particular fundamental right, but the direct and inevitable effect may be on another fundamental right and in that case, the State action would have to meet the challenge of the latter fundamental right. In testing the validity of the State action with reference to fundamental rights what the Court must consider is the direct and inevitable consequence of the State action.

10. **The challenge to the competency of the State Legislature:**

. The petitioners' arguments and/or contentions on the ground of challenge to the competence of the Legislature can be briefly summed up under these heads:-

A. The amendment does not fall within the legislative competence of the State Legislature, as there is no entry 'morality' in List II of the VIIth Schedule to the Constitution of India.

B. Even if the doctrine of pith and substance is applied, at the highest it may fall within the concurrent list. The subject matter is covered by law made under the concurrent list in respect of which there are already Central Legislation in force. The amendment to the Bombay Police Act i.e. Section 33A is inconsistent with the laws made by parliament. The Bombay Act was not reserved for consent of the President of India, nor assented to by the President of India. It would, therefore, be repugnant to the Central Law and consequently invalid or unconstitutional under Article 254 of the Constitution of India.

C. The amendment is nothing but a colourable legislation in colourable exercise of powers.

D. The amendment amounts to a fraud on the Constitution, as the State Legislature though was incompetent to pass the amendment has usurped the power, by encroaching on the law making power of the parliament.

E. The amendment, considering the affidavits filed, is to prevent human trafficking based on International Covenants. Parliament alone

under Article 253 of the Constitution has power to make a law on Trafficking to give effect to International covenants and as such the amendment is unconstitutional.

. On behalf of the State, the learned Advocate General submits that the amending Act falls under Entry 1, List II of the VIIth Schedule which deals with public order. A bare perusal of the preamble to the Bombay Police Act, 1951 makes it manifest that the act is meant for maintenance of public order. The Rules made, are for licensing and regulating places of public amusement other than cinema and performance of public amusement including melas and Tamasha. They are meant to uphold public decency, morality and public order. Regulating performance by licensing is an essential part of public order. The submission that the amendment would fall in the residuary entry namely Entry 97 List I is misconceived and unsustainable. To resort to Entry No.97, the incompetence of the State Legislature must be first established by applying the doctrine of Pith and Substance. The amending Act deals with public order. Merely because some portion of the subject matter of the legislation may touch upon an entry in another list, the same cannot be a ground for holding that the Legislation is beyond the competence of the State Legislature.

. On behalf of the Commissioner of Police, Mumbai, it is submitted that the Bombay Police Act has been enacted by the State Legislature and can be justified by Entry Nos.1 and 2 and 8 of List II viz. entry relating to public order. Policing and control of the manufacture, sale and distribution of intoxicant liquors is within the competence of the State Legislature. It is submitted that the State mechanism which controls the sale of intoxicant liquor in bars cannot be misused by the licensees by exploiting women by committing acts which are derogatory to the dignity of women. Under Article 51 of the Directive Principle of State Policy, it is the duty of the State to implement all international treaties and covenants. Section 33A and 33B are not laws passed to enforce international covenants, but have been passed to regulate the conduct of eating house, permit room or beer bar, taking into account the fact, that under the administrative policy it is also required to ensure that the dignity of women is preserved and they are not exploited. This is the value which is prescribed in several international covenants. Section 33A and 33B which is the part of police functions independently subserves the covenants which India has entered into in the matter of International law. Section 33A and 33B are not laws passed in Pith and substance to enforce International Treaty or covenants. It is a law passed to regulate conduct of bars and as a part of

police functions. It helps to subserve the international covenant relating to women's dignity and prevention of exploitation.

11. On behalf of the Deputy Chief Minister and Home Minister, who is the Respondent No.4 in Criminal Writ Petition NO.1971 of 2004, learned Counsel submits that the law would squarely fall within the entries in List II and the following fields of legislation:-

| List: | Entry: | Subject/aspect: |
|---|---|---|
| II | 33 | Entertainment or Amusement |
| II | 2 | Police |
| II | 8 | Intoxicants |
| II | 1 | Public Order |
| II | 6 | Public Health |
| II | 64 | Offences against laws with respect to above matters. |

It is submitted that the statutory provisions are "in respect of" an activity of exploitation of women conducted for financial gain or advancement by a number of bar owners and other intermediaries which was projected as business of holding live entertainment or amusement by women in public places, licensed as eating houses, permit rooms or beer bars, where food or drinks or intoxicants were served. The

institutionalised activity was having ill effects on society and in particular on safety, public health, crimes traceable to material welfare, disruption of cultural pattern, fostering of prostitution, infiltration of crime, problems of daily life of customers and their dependents and self abasement apart from the degradation of the women themselves. The provisions are intended to abolish the evil and immoral practices to give effect to the constitutional aims. The statute prohibits live entertainment in such places after the commencement of the act and makes the holding of dance performance an offence. Entry No.33 deals with entertainment and must be given its widest amplitude so as to include power to prohibit or restrict a particular kind of entertainment in particular places of public entertainment where the need is felt most. Considering Entry No.8 the scope of the legislative power under these entries must include within their ambit all aspects of entertainment activity which may result in or are likely to result or have resulted in disorderly behaviour, danger to safety of the people in neighbourhood, crimes traceable to the evil, opening of avenues for fostering of prostitution, infiltration of criminal activities. The State in such circumstances is not legislating in respect of the offences themselves but is removing the malignancy itself. It is the duty of the State to take steps to protect public health and this will

include the secondary effects on the dancers and the patrons as well as the general public. Coming to entry No.64 it is submitted that this entry covers sub-section (2) of Section 33A, if the State has legislative competence to enact the main provision. It is then submitted that considering the width of entry 8 of List II as the State Government has exclusive privilege to deal in liquor, it has also to be borne in mind that it has a constitutional and legal duty to safeguard the public interest and public health. A positive obligation is cast on the State that any activity in dealing with liquor must strictly conform to the public interest and ensure public health, welfare and safety. On a combined reading of Entry 8 and Entries 1, 2, 26, and 33, the Legislative Competence of the State is apparent.

12. Before we deal with the entries, let us examine some contentions urged on behalf of the petitioners. The issue of the expressions, "colourable legislation, fraud on power/fraud on the Constitution" are well understood. We may gainfully refer to some observations of the Apex Court in the case of **S.S. Bola & Others vs. B.D. Sardana & Ors.**

**AIR 1997 S.C. 3127.**

> "Colourable legislation would emerge only when a legislature has no power to legislate on an item either because it is not included

in the List as assigned to it under the respective Entries in the Seventh Schedule of the Constitution or on account of limitations imposed either under Part III of the Constitution relating to Fundamental Rights or any other power under the Constitution. As the legislature enacts a statute on an assumption of such power, but when on examination, if it is found that it has travelled beyond its power or competence or in transgression of the limitations imposed by the Constitution itself, such an enactment is called a colourable legislation. It has reference only to the legislative incompetence and not to the power as such. If the legislature enacts law in the pretext of the exercise of its legislative power, though actually it did not possess such power, the legislation to that extent becomes void as the legislature makes its Act only in presence of and in purported colourable exercise of its power."

"The doctrine of fraud on power means that the legislature really has the power but does not exercise that power. It merely pretends to have exercised the power. In the eye of the law, such an Act is not a law at all, but it is mere pretence of law and the Court will

not take notice of such law. The doctrine of fraud on the Constitution is altogether a different facet and a serious charge. It would mean that when there is a constitutional restriction or prohibition to make a legislative enactment but the legislature in spite of the prohibition and restriction makes such law, it is a fraud on the Constitution. Therefore, the distinction between the fraud on power and the fraud on the Constitution is clear and unambiguous."

"The Courts have applied the doctrine of 'pith and substance' and in some cases the doctrine of "incidental" or "ancillary" or "subsidiary power" of the legislature to uphold the law or to validate the law declared by the Courts as invalid. Thereon, one of the doctrines is applied when the Court finds that the law in pith and substance is within the legislative competence but incidentally trenches upon another subject of legislation. Equally, the doctrine of "ancillary or ancillary power" the legislature is applied when the Court records a finding that the impugned Act is substantially within the legislative competence or within the assigned field of legislation dealt with under a particular

subject specified in the respective lists of the Seventh Schedule to the Constitution, but incidentally, it trenches upon another subject of legislation assigned either to the Parliament or the Legislature of a State as the case may be. However, the said doctrines cannot be employed to uphold a law that directly nullifies the declaratory law made by the Court in exercise of the power of judicial review or to make the writ of mandamus or direction ineffective or unenforceable, unless its invalidity is properly and constitutionally removed by employing the appropriate language so as to make a new law within the constitutional limits or limitations or competence of the legislature."

13. The question which the Court has to answer is whether the Petitioners have discharged the burden placed on them to show that the Legislature was incompetent to pass the amendment Act. The Apex Court in **Charanjit Lal Chowdhury vs. The Union of India and Ors., AIR 1951 SC 41** has set out that presumption is always in favour of the constitutionality of an enactment, and the burden is upon him who attacks it to show that there has been a clear transgression of the constitutional principles. In **Welfare Association, A.R.P. Maharashtra & Another**

**vs. Ranjit P. Gohil & Ors., (2003) 9 SCC 358** the said principle has been reiterated in the following words:-

> There is a presumption that the Legislature does not exceed its jurisdiction. The burden of establishing that the Act is not within the competence of the Legislature, or that it has transgressed other constitutional mandates, such as those relating to fundamental rights, is always on the person who challenges its vires. If a case of violation of a constitutional provision is made out then the State must justify that the law can still be protected under a saving provision. The Courts strongly lean against reducing a statute to a futility. As far as possible, the courts shall act to make a legislation effective and operative."

. It is now well settled that the various entries in the three lists of the Seventh Schedule are legislative heads defining the fields of legislation and should be liberally and widely interpreted. Not only the main matter but also any incidental and ancillary matters are available to be included within the field of the entry. The settled rules of interpretation governing the entries do not countenance any narrow and pedantic interpretation.

The judicial opinion is for giving a large and liberal interpretation to the scope of the entries. In interpreting a constituent or organic statute indeed that construction which is most beneficial to the widest possible amplitude of its powers must be adopted. None of the items in the lists is to be read in a narrow or restricted sense and all ancillary or subsidiary matters referable to the words used in the entry and which can fairly and reasonably be said to be comprehended therein are to be read in the entry.

. One of the proven methods of examining the legislative competence of an enactment is by the application of the doctrine of pith and substance. This doctrine is applied when the legislative competence of a legislature with regard to a particular enactment is challenged with reference to the entries in various lists and if there is a challenge to the legislative competence, the courts will try to ascertain the pith and substance of such enactment on a scrutiny of the Act in question. In this process, it is necessary for the courts to go into and examine the true character of the enactment, its object, its scope and effect to find out whether the enactment in question is genuinely referable to the field of legislation allotted to the State under the Constitutional Scheme. (**See E.V. Chinnaiah vs. State of A.P. & Ors, (2005) 1 SCC 294.**

14. The entire argument of the petitioner on the ground of legislative incompetence is to contend that the expression 'morality' is not included in any of the lists of the Seventh Schedule and consequently the power to legislate would be referable to the residuary Entry 97 of List I and that being the case it is Parliament alone which was competent to make the law.

. This argument proceeds on a basic fallacy. Before exclusive legislative competence can be claimed for Parliament by resorting to the residuary entry the legislative incompetence of the State Assembly must be clearly established. Entry 97 of List I of the Seventh Schedule itself is specific that a matter can be brought under the entry only if it is not enumerated in List II or List III and in the case of a tax, if it is not mentioned in either of those lists. In a Constitution like ours where there is a division of legislative subjects but the residuary power is vested in Parliament, such residuary power cannot be so expansively interpreted as to whittle down the power of the State legislature. That might affect and jeopardise the very federal principle. The federal nature of the constitution demands that an interpretation which would allow the exercise of legislative power by Parliament pursuant to the residuary powers vested in

it to trench upon State Legislation and which would thereby destroy or belittle State autonomy must be rejected.

. The preamble of the Bombay Police Act, 1951 and the amendments, may now be set out as under:-

> "...AND WHEREAS it is necessary to consolidate and amend the law relating to the regulation of the said Force and the exercise of powers and performances of functions by the State Government and by members of the said Force for the maintenance of public order.
>
> AND WHEREAS it is necessary to provide for certain other purposes hereinafter appearing ....."

The Preamble annexed to the Amendment Bill reads as under:-

> "Whereas the Commissioners of Police, District Magistrates and certain other Officers, have granted performance licences for holding dance performance;
>
> And whereas the object of granting such performance licences is to hold such dance

performance for public amusement;

And whereas it is brought to the notice of the State Government that the eating houses, permit rooms or beer bars to whom licences to hold a dance performance have been granted are permitting performance of dances in an indecent, obscene or vulgar manner;

And whereas it has also been brought to the notice of the Government that such performance of dances are giving rise to exploitation of women;

And whereas the Government has received several complaints regarding the manner of holding of such dance performance;

And whereas the Government considers that such performance of dances in eating houses, permit rooms or beer bars are derogatory to the dignity of woken and are likely to deprave, corrupt or injure the public morality or morals.

And whereas the Government considered it expedient to prohibit such holding of performance of dances in eating houses, permit rooms and beer bars.

15. The question, therefore, that we are called upon to answer is whether the amendment does not fall in any of the entries in list II of the Seventh Schedule as contended on behalf of the petitioners and as such would fall within the residuary entry No.97 of list I of even if it falls within List III it is occupied by Central Legislation and hence the law having not been reserved for Presidential assent is repugnant to the Central law and consequently unconstitutional. or as has been submitted on behalf of the respondents that it squarely falls within the entries 33, 2, 8, 1, 6 and 64 of List II.

. The Bombay Police Act as originally enacted under Section 33 conferred power on the authority set out therein. Sub-section (1)(w) confers power on the Competent Authorities to license or control places of public amusement or entertainment. By the amendment introduced by Act Bom.20 of 1953 power was conferred under sub-section (1)(wa) to license or control in the interest of public order, decency or morality or in the interest of the general public, with such exceptions as may be specified, the musical, dancing, mimetic or the artical or other performances for the public amusement, including melas and tamashas. Sub-clause (ii) of sub-section (wa) confers power to regulate in the interest of public order, decency or morality or in the interest of the general public,

the employment of artists and the conduct of the artists and the audience at such performance. There was also provision for prior scrutiny of such performances and of the scripts in respect thereof. It would thus be clear that licensing and regulating entry in a place of public amusement or entertainment and regulating the same, can be done in the interest of public order, decency and morality and has been in force since the main Act was amended or by the amendment of 1953. The power, therefore, to regulate and license, places of public entertainment or amusement of artists working therein was never doubted and this could not have been doubted considering Entry 33 of List II and entries 1 and 2 of List II. If there be a power to legislate and impose restrictions, the power to prohibit such performance in the establishments surely cannot be doubted. As noted by the Apex Court the entries must be given a wide amplitude.

16. Entry 8 of List II is field of legislation pertaining to Intoxicating liquors, that is to say, the production, manufacture, possession, transport, purchase and sale of intoxicating liquors. It is now the settled law (though now there is some doubt considering the dissenting opinions in **State of Punjab & Anr. vs. Devans Modern Brewaries Ltd. & Anr. (2004) 11 SCC 26**) that it is the State alone that has the exclusive privilege to deal in liquor.

. Based on that, the contention urged is that it is open to the State to regulate the form of entertainment in a place where the privilege is being exercised. For that purpose our attention was invited to some judgments of the American Supreme Court and the right of the State and the exercise of powers under the Twenty-first amendment. In **New York State Liquor Auth vs. Bellanca, 452 U.S. 714, 717 (1981)** where there was a regulation on artists performance in Bars, that Court observed as under:-

> "Common sense indicates that any form of nudity coupled with alcohol in a public place begets undesirable behaviour. This legislation prohibiting nudity in public will once and for all, outlaw conduct which is now quite out of hand".

In **Crowley vs. Christensen, (1890) 34 Law Ed. 620** the Court observed:-

> "The state, under its regulatory powers, has the right to prohibit absolutely every form of activity in relation to intoxicants - its manufacture, storage, export, import, sale and possession. In all their manifestations, these rights are vested in the State and indeed without such vesting there can be no

> effective regulation of various forms of activities in relation to intoxicants.....It is a question of public expediency and public morality, and not of federal law."

The Court then observed as under:-

> "These observations have our entire concurrence and they completely negative the contention raised on behalf of the petitioner. The provisions of the regulation purport to regulate trade in liquor in all its different spheres and are valid."

From the above observation it may be noted that in the U.S.A. Courts have taken a view that in matters pertaining to places where liquor is sold, it is open to the State in exercise of its power to impose restriction on the form of entertainment in places where liquor is served or sold more so in cases where public expediency and public morality demands. We will examine whether this principle can be adopted in the present case in our discussion to challenges under Article 19(1)(g).

17. It is no doubt true that the preamble notes that dances in indecent manner is derogatory to the dignity of women and likely to disrupt, corrupt or injure public morality or morals. It is also set out

that such performances are giving rise to exploitation of women. As has rightly being pointed out, it is always open to the State to bear in mind the constitutional principles including directive principles, fundamental duties as also international covenants while enacting a legislation. The State Legislature while enacting a law can take note of international covenants and treaties to which India is a party and/or signatory, as long as the law which it makes falls within its competence or traceable to a right under Part III and or in furtherence of the directive principles. If the law falls within its competence it would not be a law enacted to bring into force international covenants and treaties. Such a power only flows to Parliament under Article 253 read with Entries 13 and 14 of List I. Both Lists II and List III contain innumerable entries in respect of which Central Government as the Federal Government may have signed treaties and conventions. If the State Legislature while enacting a law within its competence, bears in mind the principles as contained in those conventions or treaties, as long as the law made is within its competence, it cannot be said that this would impinge on the domain of parliament and such an exercise of power would either be a colourable exercise of power or fraud on the Constitution. What the State Legislature in fact does, is to enact a law within its field of competence, but bearing in mind while enacting such a

law, international treaties or conventions to which India is a signatory or a convention which by passage of time has reached the status of customary international law. The other aspect of the matter is that once the Legislation is referable to entries in the IInd Schedule, the mere fact that it may also impinge on some entries in List I or List II by itself would not make the legislation unconstitutional. The doctrine of pith and substance will have to be applied. If so applied and as we were examining the entries in list II, the present law substantially is referable to entries 2, 8, 33, and 64 of List II. We have, therefore, no hesitation in holding that the State Legislature had competence in enacting the law.

18. That brings us to the other issue raised on competency, namely repugnancy between a Central Act and the State Act. Article 254 of the Constitution would only be attracted if the law made by the state Assembly is pursuant to a power conferred on it under List III of the Constitution of India and in respect of which Parliament has also made a law. As we have noted earlier, the law made by the State Assembly is traceable to the power conferred on it under entries in List II of the Constitution. We may only refer to the judgment in **The Bar Council of U.P. vs. State of U.P. & Another 1973 S.C. 231** where in the matter of repugnancy, the Apex Court observed as under:-

> "The question of repugnancy can only arise in matters where both the Parliament and the State Legislature have legislative competence to pas laws. In other words when the legislative power is located in the Concurrent List the question of repugnancy arises."

It will thus be clear that considering the finding recorded by us, in the earlier part of this Judgment, the law made is within the law making power conferred on the State Assembly in List II. The issue of repugnancy, therefore, would not arise.

19. **The challenge on the ground that curtailing of judicial discretion interferes with the independence of the Judiciary and as such the basic feature of the Constitution.**

. The next contention is that the State Legislature by curtailing judicial discretion has interfered with the independence of judiciary which is a basic feature of the Constitution. Reliance for that is placed on the Judgment in **Registrar (Administration) High Court of Orissa, Cuttak vs. Siser Kanta Satapathy (dead) by L.Rs. and Anr., AIR 1999 SC 3265**. In our opinion the contention is totally misplaced. Once it is open to the State

Legislature to enact the law, it was open to the State Legislature also to amend the law. While amending the law it will also be open to the Legislature in the matter of sentencing, to provide in what cases the punishment should act as a deterrent and a case where discretion is conferred to issue lesser punishment, then to give reasons for the same. Such an exercise of power is not unknown to legislation in India. If there be power to fix a term of imprisonment it is an incidental power to regulate sentencing. At any rate this does not interfere with the judicial power of the Court in conducting trial or holding the person guilty. All that the law stipulates is once the Court holds the person to be guilty, in the matter of sentencing, if it proposes to give a lesser punishment considering the discretion conferred, then to give reasons for its decision. The Criminal Procedure Code provides for hearing before sentencing, it also provides in certain kind of cases that the person convicted, instead of being sentenced to imprisonment be placed under probation. There are several other illustrations, including in the Indian Penal Code. The contention that the law infringes the basic feature of the Constitution, the argument must be rejected without any further discussion.

20. **Affidavit in reply not verified according to law:** . A submission was made that the affidavit in

reply dated 1st October, 2005 had not complied with the provisions of Order 19 Rule 3 of the Code of Civil Procedure. Subsequent to the contention being urged, on behalf of the respondents State an additional affidavit was filed by Youraj Laxman Waghmare dated 23rd November, 2005. In that affidavit the practice followed on the Original Side of this Court has been set out. It is not necessary for us to decide whether such a practice is in consonance with the provisions of the Code of Civil Procedure. The requirement for verification is to enable the Court to know whether the affiant is deposing to the facts based on his personal knowledge or based on information conveyed to him and which he believes to be true and/or based on records. If such an affirmation is not made and it is affidavit evidence which the Court must consider, it will be impossible for the Court to decide whether the petitioner has made a false statement before it and if so whether the facts can be relied upon. Also in the absence of verifying the paragraphs as set out earlier, it may not be possible to proceed against the petitioner for perjury or contempt. Mr. Waghmare, however, has now added a verification clause subsequent to the argument, rectifying the irregularity. No additional arguments have thereafter been advanced after verification. Once that be the case in our opinion it is not necessary to further answer the said issue. The failure to

affirm an affidavit was an irregularity which was curable. The respondents have taken steps to cure the irregularity. The Court has taken the affidavit on record. Once that be so it is not necessary for this Court to refer to the various judgments relied upon by the learned Counsel for the petitioner in Writ Petition NO.2459 of 2005. Even otherwise in a challenge to a Legislation, affidavit is not the only material relied upon by the Court. That argument, therefore, must be rejected.

21. **Maharashtra Act No.35 of 2005 is not applicable to the petitioners members:**

. Writ Petition No.2450 of 2005 was amended by adding the following prayer clause:-

> (aa) that this Hon'ble Court be pleased by an appropriate Writ/Direction to declare that the provisions of the amending Act XXV of 2005 amending the provisions of the Bombay Police Act, 1951 by introducing Section 33(A) and Section 33(B) are not applicable to the establishments of the members of the Petitioners' Association who hold the requisite licences under Section 2(9) and 2(10) of the Bombay Police Act, 1951."

It is submitted on behalf of the petitioners that the

establishments of the members are places of public entertainment as defined under Section 2(10) and places of public amusement as defined under Section 2(9) and are not 'eating houses' as defined under Section 2(5A) of the Bombay Prohibition Act, 1951. A room in the place of public entertainment is demarcated and separated from the rest of the establishment for service of liquor where only permit holders are allowed to enter and no amusement performances are permitted there. Hence the activity of sale of liquor is distinct and separate. The 1st petitioner has pleaded that its members have three different activities in their respective establishments which are independent of each other:-

(i) Service of food;

(ii) performance of music and dance; and

(iii) service of liquor in an independent and demarcated room approved by the Collector/Licensing Authority.

For the purpose of carrying on the above mentioned separate and independent activities, the petitioners' members are required to obtain licences from:-

(i) the Mumbai Municipal Corporation for selling and serving food;

(ii) from the Commissioner of Police for Premises, Performance and Entertainment Licences; and

(iii) from the Collector under the Bombay Prohibition Act, 1949 read with the Bombay Foreign Liquor Rules, 1953 for selling liquor.

To serve liquor in the establishment, a person is required to apply for a licence in Form FL III under Rule 44 of the Bombay Foreign Liquor Rules, 1953 framed under the provisions of the Bombay Prohibition Act, 1949. Along with the application, a Plan of the Restaurant is submitted to the Licensing Authority showing a room or an enclosed area independent of the rest of the establishment for "sale and consumption of Foreign Liquor". The application is then placed before a Statutory Committee for consideration and the Collector then considers the recommendation of the statutory committee and after satisfying himself that the "premises where it is proposed to sell Foreign Liquor" are in conformity with the Rules, sanctions an FL III licence under Rule 45 of the Bombay Foreign Liquor Rules, 1953. The Plan of the proposed premises showing and demarcating the room where liquor is to be served, is then approved by the Collector by affixing his stamp and signature on the

plan. It is also submitted that the guide-lines dated 26th April, 1989 issued by the Government prescribe various conditions which are required to be fulfilled for being considered for grant of an FL III license. The entry to the said room duly licensed to sell and serve liquor is restricted to permit holders only.

Rule 52 of the Bombay Foreign Liquor Rules, 1953 prescribes as follows:-

"52.Sale and consumption of foreign liquor-

(1) Foreign liquor may be sold in pegs or bottles to a foreigner or a permit-holder at a hotel or restaurant for consumption only in the room or rooms assigned for that purpose and approved by the licensing authority for the use of foreigners and permit-holders only. Foreign liquor may also be sold in pegs or hotels to a resident in such hotel, for consumption in his room;

Provided that, wines may be served only to foreigners for persons holding valid liquor permits in the dining rooms of such hotel or restaurant."

(2) Foreign liquor may be sold in pegs or bottles at a club to any member thereof for

his guest holding permit for consumption only in the room or rooms assigned for that purpose and approved by the licensing authority and to any member of the club residing therein only for consumption in his room;

Provided that, mild liquor may be served to any member including his guest (such member or guest being not below twenty-one years of age) for consumption at any place within the premises of the club, which is not within view from any public place."

It is, therefore, submitted that the activity of sale and consumption of foreign liquor is an activity independent of the rest of the establishment and is restricted to the demarcated and designated room approved by the Collector for sale and consumption of liquor. On certain days sale of liquor is prohibited. On such days the demarcated room or rooms for the sale of liquor are kept closed and the rest of the establishment is allowed to function and other activities of the Restaurant like sale of food and amusement performances are not disturbed. It will, therefore, be apparent, it is submitted, that the sale of liquor is an independent activity and other activities can continue even when liquor is not served. It is submitted that the right to trade in

liquor may not be a fundamental right, but in so far as the State of Maharashtra is concerned, a law having been enacted for carrying on trade in liquor by Licensees holding valid licences issued under the Bombay Prohibition Act, 1949 read with the Bombay Foreign Liquor Rules, 1953, the petitioners' members, who are the holders of such licences, have a statutory right which can be invaded only in accordance with the law. The amendment only prohibits holding of a performance of dance of any kind or type in an Eating House, Permit Room or Beer Bar. The expression "Permit Room" and "Beer Bar"are not defined either in the Bombay Police Act, 1951 or in the Bombay Prohibition Act, 1949. Similarly, the term "Dance Bar" is also not defined in the Bombay Police Act, 1951 or the Bombay Prohibition Act, 1949. These terms can, therefore, at best be considered as "phrases of convenience" and are, therefore, capable of being moulded to suit the convenience of the occasion. If the room approved for sale or consumption of liquor is construed for the purposes of convenience as "Permit Room" or "Beer Bar", only the designated "permit room" or "Beer Bar" room will be covered under the prohibition contemplated by the impugned amendment. The petitioners members do not have any dance performances in the room assigned for sale and consumption of foreign liquor or beer. Dance and music are performed only in the remaining portion of the place of public entertainment

excluding the said permit room and as such the impugned amendment would not apply to them as their establishment is excluded from the definition of eating house by Section 2(5A) of the Bombay Police Act, 1951 and consequently the declaration as prayed for.

22. On behalf of the State, the learned Advocate General submitted that the definition of 'eating house' as contained in Section 2(5A) and of "place of public entertainment" in section 2(10), would demonstrate that the reason for exclusion of place of public entertainment from the definition of eating house, is because liquor or any other substance cannot be served in an eating house which has a license for keeping a place of public entertainment. Thus to differentiate between restaurant which sells food but does not sell liquor the legislature has excluded place of public entertainment from the definition of eating house. In so far as a place of public entertainment is concerned the licence is issued to an eating house, which enjoys an additional facility to serve liquor, wine and beer. In other words a place of public entertainment includes an eating house. A Division Bench of this Court in **D.S. Mudaliyar vs. State of Maharashtara & Ors., in Writ Petition No.24 of 1998** decided on 4th October, 2004 has held that though eating house may not be included as a place for public entertainment, nevertheless a

place of public entertainment includes an eating house and this question therefore is no longer res integra. It is also pointed out that under the Rules liquor can only be served for consumption in the permit room and at or near the eating house. The area/room assigned has to be approved for that purpose by the licensing authority. It is submitted that the argument advanced on behalf of the petitioners that they are serving liquor in an area not covered by FL III licence or based on an illegality ought not to be countenanced by the Court.

23. An establishment, which has an eating house, FL III Licence and a place of public entertainment licence, can be divided into two parts:-

(a) The area of the premises of eating house i.e. fully covered by the FL III licence and where liquor can be served; and

(b) the remaining area not covered by the FL III licence where liquor cannot be served.

. Can the submission on behalf of the petitioners in Writ Petition NO.2450 of 2005 that the Act is not applicable to the petitioners' members be sustained? For the purpose of considering the same let us consider the various definitions which are involved. Under the provisions of the Bombay Police

Act, 1951.

"Section 2(5A) "eating house" means any place to which the public are admitted, and where any kind of food or drink is supplied for consumption in the premises by any person owing or having an interest in or managing such place, and include a refreshment room, boarding-house, coffee-house or a shop where any kind of food or drink is supplied to the public for consumption in or near such shop; but does not include "place of public entertainment".

"Section 2(10) "place of publi entertainment: means a lodging-house, boarding and lodging house or residential hotel, and includes any eating house in which any kind of liquor or intoxicating drug is supplied (such as a tavern, a wine shop, a beer shop or a spirit, arrack, toddy, ganja, bhang or opium shop) to the public for consumption in or near such place."

"Section 2(9) "place of public amusement" means any place where music, singing, dancing, or any diversion or game, or the means of carrying on the same, is provided and to which the public are admitted either

on payment of money or with the intention that money may be collected from those admitted and includes a race course, circus, theatre, music hall, billiard room, bagatelle room, gymnasium, fencing school, swimming pool or dancing hall."

We have earlier reproduced Section 33A which clearly sets out that holding of performance of dance of any kind or type is prohibited in an eating house, permit room or beer bar. The submission as noted earlier on behalf of the petitioners is that their place is not an eating house as they have a license for a place of public entertainment and further no activity of dance is carried out in the permit room or beer bar. The question that therefore emerges is, if dance and music are performed only in the remaining portion of the place of public entertainment not covered by FL III licence, for which they have a license as an eating house, can the activity of dancing or music be prohibited? In such a situation let us examine the process of interpretation of a statute. The object of interpreting a statute is to ascertain the intention of the Legislature. If there be casus omissus, it cannot be supplied by the Court except in case of clear necessity and where reasons for it is found in the four corners of the statue itself. At the same time a casus omissus should not be readily inferred and for that purpose all the parts of the

Statue or Section, must be construed together so that the construction to be put to a particular provision makes a consistent enactment of the whole statute. This is more so in a case where the literal construction would lead to a manifest absurdity or analogous result which would not have been intended by Legislature. A casus omissus ought not to be created by interpretation, save and except in case of necessity. On a construction of the definitions earlier reproduced it is clear that eating house does not include a place of public entertainment. However, the definition of place of public entertainment, includes an eating house where liquor or intoxicant drug is supplied for consumption to the public in or near such place. Therefore, it would be clear that a place of public entertainment would include an eating house. An eating house to which is attached a permit room or beer bar to serve liquor or intoxicants can be a place of public entertainment. It would therefore not be correct to accept the submission that in a place of public entertainment, the area where liquor or intoxicants are not served is not an eating house and, therefore, the Act is not applicable. What the Court must examine while considering the amending Act, is the object behind the Act. In the instant case the object is to prohibit all forms of dancing in an eating house, beer bar or permit room which are derogatory to women as also expolitation of women. It must be presumed

that the Legislature was aware of the various definitions. Otherwise if the argument on behalf of the petitioners is accepted, it may amount to an absurdity that the place where no liquor or drugs are sold is prohibited from having dance performance of any kind but in respect of those who have a license for public entertainment including an eating house having an attached permit room or beer bar there is no such ban. Such a construction also would defeat the main object of the legislation. The object is to ban dancing for reasons earlier stated in certain categories of hotels having an eating house and FL III licence where liquor is sold. If the construction urged on behalf of the petitioner is accepted it would defeat this very object. The contention, therefore, as urged on behalf of the petitioners that their establishments are not covered by Section 33A of the Act has to be rejected.

24. **Does Prohibition of dancing, amount to discrimination against women and, therefore, violative of Article 15(1):**

. The submission of the petitioners is that the State shall not discriminate against any citizen on grounds only of religion, race, caste, sex, place of birth or any of them as enshrined in Article 15(1) of the Constitution of India. Women, it is submitted, constitute an overwhelming majority of bar dancers.

The primary object and the direct and inevitable effect is the prohibition of dance performance by women in dance bars and thereby denial of employment opportunity mostly to women. Therefore, the State action in prohibiting dancing, infringes their fundamental right, by practising discrimination on them which is prohibited under Article 15(1) of the Constitution of India. In the present case the effect of the impugned amendment is that it disproportionately impacts women, on the basis of their sex and this was clearly foreseen and intended by the Legislature to so impact. It invades their right to equality, right of freedom of speech and expression, right to occupation or profession or right to livelihood. If the object of Article 15(1) is considered it is bar on the State, amongst others not to discriminate against any citizen on the ground of sex. In the instant case is it so? From the averments of the petitioners and material which has come on record it would be clear that dancing in the exempted establishments was mostly performed by women.

. The law banning dancing in so establishments and exempting other establishments, however, is not traceable to banning dances performed by women only. It is true that the preamble, the objects and reasons clause, and the reply of the State, indicates that it is to ban dancing by women,

as will be discussed whilst discussing Article 14 of the Constitution of India. That, however, does not mean that dancing is being prohibited only on the ground of sex. What is being prohibited is dancing in identified establishments. No dancing is permitted in the establishments say by males. The argument could have been accepted if in the banned establishments dancing by males were permitted. The law makes no such distinction. The Act prohibits all types of dances in the banned establishments by any person or persons. Whether such a blanket ban is possible need not be answered, whilst answering the issue. Apart from that the direct and inevitable consequences on the fundamental rights of the dancers of carrying on the occupation or profession are being independently examined. The prohibition, therefore, applies to both men and women. That being the case, the argument advanced on behalf of the petitioners of violation of Article 15(1) has no merits and consequently must be rejected.

25. **The Ban amounts to an unreasonable restriction on the fundamental right of the bar owners and bar dancers of free speech and expression guaranteed under Article 19(1)(a):**

. The petitioners in Writ Petition Lodging No.2338 of 2005, Writ Petition No.2587 of 2005 and Criminal Writ Petition No.1971 of 2005 have also

raised an issue that totally banning the performance of any form of dance in the banned establishments, is violative of the freedom of expression guaranteed by the Constitution under Article 19(1)(a). The arguments proceeds on the basis that dance is a form of expression and that cannot be disputed. Dancing, as an act of entertainment, is deeply rooted in this Nation's history and tradition. Dancing is almost regarded as a national heritage. The stone carvings and pictures in "Kailash Temple" at Ellora, Khajuraho and paintings at Ajanta, stands out as an evidence of history, traditions and cultural heritage of India. The Vedas, Upanisadas, Sruties, Smrities, Puranas and other religious teachings or moral codes, along with traditions, followed in Ancient India, bears testimony to the fact that dancing has been considered as a mode of entertainment and has had earned social sanction even in the early vedic age. There is nothing brought on record to show that the dance performance in bars by its very nature is vulgar obscene or indecent. That burden was on the State, which has not been discharged. It is further submitted that the freedom of expression means the right to express one's convictions and opinions freely by word of mouth, writing, printing pictures or any other mode. This freedom to appeal to reason is the basis of democracy. The freedom of singing and dancing is an important medium of expression and an integral part of freedom of speech and expression

guaranteed under Article 19(1)(a), in as much as it protects the right of the performer to perform and also protects the right of the viewer to view and watch to the performance. Reliance for that is placed in the judgment of in **Maneka Gandhi vs. Union of India, AIR 1978 S.C. 597.** where the Apex Court has held dance to be a part of the right guaranteed under Article 19(1)(a). This is what the Court said:-

> "Similarly, the right to paint or sing or dance or to write poetry or literature is also covered by Article 19(1)(a), because the common basic characteristic in all these activities is freedom of speech and expression, or to put it differently, each of these activities is an exercise of freedom of speech and expression. It would thus be seen that even if a right is not specifically named in Article 19(1), it may still be a fundamental right covered by some clause of that Article, if it is an integral part of a named fundamental right or partakes of the same basic nature and character as that fundamental right."

A learned single Judge of the Calcutta High Court applied that principle in **Mrs. Usha Uthup vs. State of West Bengal, AIR 1984 Calcutta 268**.

26. It is then sought to be pointed out that the prohibition and/or restriction is impermissible and not protected by Article 19(2) of the Constitution and in these circumstances the total banning of dance in the prohibited establishments affects the owners and the dancers of freedom of expression and is consequently violative of Article 19(1)(a) of the Constitution of India.

. To consider this argument let us first examine as to whether dancing in dance bars would fall within the meaning of the word, the right to freedom of speech and expression or is dancing merely an occupation or profession. The issue as to what would fall within the expression 'freedom of speech and expression' had come up for consideration before the Apex Court in **Hamdard Dawakhana & Anr. Vs. The Union of India & Ors., AIR 1960 S.C. 554**. The issue before the Apex Court arose from the provisions of the Drugs and Magic Remedies (Objectionable Advertisements) Act. The preamble to the Act set out that it was an Act to control the advertisement of drugs in certain cases and to prohibit the advertisement of magic qualities which the drug alleged to possess and to provide for matters connected therewith. The contention of the petitioner was that on the Act coming into force, they were experiencing difficulties in the matter of

publicity for their products, as various objections were raised by the authorities in regard to their advertisements and they were informed that they had violated the provisions of the Act and consequently they were called upon to recall their products sent to various stations. Various representations thereafter followed and as no relief was granted, the Act was assailed amongst others on the ground that it infringed the right of free speech under Article 19(1)(a) and also the right to carry on trade and business. The Apex Court relied upon the judgments of the American Supreme Court for consideration of the issue of the nature of rights. The Apex Court in paragraph 17 of the Judgment observed thus:-

> "An advertisement is no doubt a form of speech, but its true character is reflected by the object for the promotion of which it is employed. It assumes the attributes and elements of the activity under Article 19(1) which it seeks to aid by bringing it to the notice of the public. When it takes the form of a commercial advertisement which has an element of trade or commerce, it no longer falls within the concept of freedom of speech for the object is not propagation of ideas-social political or economic or furtherance of literature or human thought, but as in the present case the commendation

> of the efficacy, value and importance in treatment of particular diseases by certain drugs and medicines".

The Court then observed as under:-

> "It cannot be said therefore that every advertisement is a matter dealing with freedom of speech nor can it be said that it is an expression of ideas. In every case one has to see what is the nature of the advertisement and what activity falling under Article 19(1) it seeks to further. The advertisements in the instant case relate to commerce or trade and not to propagating of ideas; and advertising of prohibited drugs or commodities of which the sale is not in the interest of the general public cannot be speech within the meaning of freedom of speech and would not fall within Article 19(1)(a). The main purpose and true intent and aim, object and scope of the Act is to prevent self- medication or self-treatment and for that purpose advertisements commending certain drugs and medicines have been prohibited....."

The Court then proceeded to observe that:-

> "Freedom of speech goes to the heart of the natural right of an organised freedom-loving society to "impart and acquire information about that common interest". If any limitation is placed which results in the society being deprived of such right then no doubt it would fall within the guaranteed freedom under Article 19(1)(a). But if all it does is that it deprives a trader from commending his wares it would not fall within that term".

. Hamdard Davakhana (supra) was explained by the Apex Court in **Tata Press Limited vs. Mahanagar Telephone Nigam Ltd. & Ors., AIR 1995 SC 2438.** The question before the Apex Court was whether commercial speech is denied the protection of Article 19(1)(a) of the Constitution of India, merely because the advertisements are issued by businessmen. The Court observed that "Commercial speech" cannot be denied the protection of Article 19(1)(a) of the Constitution merely because the same are issued by businessmen. The Court observed that so far as the economic needs of a citizen are concerned, their fulfilment has to be guided by the information disseminated through the advertisements. The protection of Article 19(1)(a) is available to the speaker as well as to the recipient of the speech. The recipient of "commercial speech" may be having

much deeper interest in the advertisement, than the businessman who is behind the publication. An advertisement giving information regarding a life saving drug may be of such more importance to general public than to the advertiser who may be having purely a trade consideration. Therefore, "commercial speech" is a part of the freedom of speech and expression guaranteed under Article 19(1)(a). In that case on behalf of the respondents relying on the observations in Hamdard Dawakhana (supra) it was contended that commercial advertisement is outside the concept of freedom of expression. The Court held that Hamdard Dawakhana's case primarily relied on the judgment of the United States Supreme Court in Valentine v. Chrestensen (1941(86) Law Ed. 1262) that purely commercial advertising is not protected by Article 19(1)(a) of the Constitution. It was pointed out, that since then, the United State Supreme Court has accepted purely commercial advertisement for a protection of the first amendment. Reference was then made to a judgment in **Indian Express Newspapers (Bombay) Private Ltd. & Ors. vs. Union of India, AIR 1986 SC 515** wherein Hamdard Dewakhana was explained by holding that the object of that Act was the prevention of self-medication and self-treatment by prohibiting instruments which may be used to advocate the same or which tended to spread the evil. The Apex Court then observed that it was of the view that all commercial

advertisements cannot be denied the protection of Article 19(1)(a) of the Constitution merely because they are issued by businessmen. Having said so the Court held that a reading of Hamdard Dawakhana's case (supra) and the Indian Express Newspaper's case(supra) led to the conclusion that "commercial speech" cannot be denied the protection of Article 19(1)(a) of the Constitution.

27. Dance admittedly is a form of expression whatever be the civilization aspect. Maneka Gandhi (supra) has recognised dance as part of fundamental right to freedom of speech and expression. It is, therefore, now accepted that dancing is a part of the fundamental right, being the "right to express". The question then would be whether dance in the form of entertainment for commercial purposes can be regarded as a part of "right of expression. Let us take an illustration. Firstly a group of people with a view to put across their point of view organise an entertainment programme which could be a dance performance with a view to attract an audience and not to economically benefit from the same, but raise issues of concern which may be political, social or economic, amongst those who participate or a wider audience through any form of media, electronic, press or any other form. They may or may not charge a fee for entrance. The Second illustration would be as in the instant case. A person running a business or

trade with a view to attract a large clientele or to increase profit volumes or the like, organises or allows an entertainment programme with his business activities or as a part of or ancillary to his trade or business, as in the instant case in an eating house having a liquor license. In the first illustration the entertainment normally should fall within the expression "the right to speech and expression' as it is organised for putting across a point of view for those desirous of attending it. In the second case, it is ancillary to the right to carry on trade or business and in a case of the dance performers, right to an occupation or profession as the activity intends to promote the businessmen's trade and the dancers right to practice a profession or carry out an occupation. In a case where more than one fundamental right under Article 19 is involved or overlapping of fundamental rights, the doctrine of pith and substance could be applied as observed by H.M. Seervai in Constitutional Law of India, placing reliance in the judgment of Mathew J. in **Bennet Colmen & Co. vs. Union of India, AIR 1973 S.C.106.** In the present case the owner of a premises having a licence for entertainment, contends that dancing apart from forming part of right to trade or business also forms a part of the fundamental right of freedom of expression. Applying the doctrine of pith and substance, on the facts and material on record, it will be open to the Court to record a

finding of fact as to which fundamental right is being infringed. The fundamental rights conferred by our Constitution are not absolute. Article 19 has to be read as a whole. The fundamental rights enumerated under Article 19(1) are subject to the restrictions mentioned in clauses (2) to (6) of the said article. Hence, the correct way to describe the fundamental rights under Article 19(1) is to call them qualified fundamental rights.

28. Freedom of speech and expression is the foundational basis from which all other fundamental rights spring and can be enjoyed. It will, therefore, be not possible to place limitations or boundaries on such a valuable right of expression except to the extent provided under Article 19(2) as it is indispensible to all freedoms. This right is the basis of human personality and its advancement. Right of dissemination and information has constituted significantly to the onward march of civilisation. Freedom to express is integral to any democracy. It is not meant only, to refer to an individual right, but rather the right of community to be heard and be informed. Therefore, dancing as a form of entertainment would be an expression of one's thoughts and feelings conveyed to an audience or for ones own pleasure. An artistic expression is a part of right of speech and expression and continues to be so, if the artist does it purely as a part of an art

or incidental thereto and even if the artist seeks to commercially gain from it or as a part of an occupation, as long as it is not sought to be exercised in a premises which is licensed to another for carrying on trade and/or business or occupation, in which event that right would on the doctrine of pith and substance form a part of the right to freedom of occupation or profession.

29. The petitioners have relied on several other judgments. We may advert to some of them. Reference may now be made to judgment of the single Judge of the Calcutta High Court in **Mrs. Usha Utup vs. State of West Bengal & Ors., AIR 1984 Calcutta, 268.** In that case the petitioner an artist was refused permission to use a hall of a trust for a music performance. The learned Judge was considering both Article 19(1)(a) and 19(1)(g). The Court held that the public authority could not deny permission to the petitioner from performing the music performance as it violated Article 19(1)(a). The Court also held that by refusing permission it amounted to violation of the fundamental right to practice a profession or to carry on an occupation and this would be violative of Article 19(1)(g) of the Constitution.

. We may now refer to the judgment in **Fertilizer Corporation Kamagar Union v. Union of India** (supra) to test the correctness of the view

that we have held, as to why on the facts of the case the fundamental right to 'expression' is not attracted. In that case the company wanted to sell certain plants and equipments which were redundant. The Union sought to intervene on the ground that they were persons aggrieved as their fundamental rights would be affected as it would jeopardise the employment of several thousand workers, who would subsequently face retrenchment and as such the right of the petitioners to carry on an occupation. Though this was a judgment under Article 19(1)(g), to an extent, it indicates the rights of a party who also pleads violation of Article 19(1)(a). The contention of the workmen was rejected by holding that the right to pursue a calling or to carry on an occupation is not the same thing as the right to work in a particular post under a contract of employment. If the workers are retrenched consequent upon and on account of the sale, it will be open to them to pursue their rights and remedies under the Industrial Laws. However, closure of an establishment in which a workman is for the time being employed does not by itself infringe his fundamental right to carry on an occupation which is guaranteed by Article 19(1)(g) of the Constitution. The Court further held that even assuming that some of the workers may eventually have to be retrenched,it will not be possible to say that their right to carry on an occupation has been violated. It would be open to them, though

undoubtedly it will not be easy, to find out other avenues of employment as industrial workers. Article 19(1)(g) confers a broad and general right which is available to all persons to do work of any particular kind and of their choice. It does not cover the right to hold a particular job or to occupy a particular post of one's choice. Similarly if employed or on contract, a person is allowed to 'dance' in the licensed establishment of such others then in that event on that person losing the license the dancer who is prohibited from dancing cannot complain of violation of freedom, speech and expression, assuming that he could do so.

30. In the instant case the dancers are not individuals contending that they are prevented from dancing. They dance or have a dance performance in premises of another, who had a performance licence. The law enacted by the State is not to have dancing in the prohibited establishments. The owner of a premises earlier could permit the activity of dancing, consequent on obtaining a license. The other activity is of eating house and permit room. The bar owner organises dance performance, for those who frequent his establishment by way of entertainment. The guest could partake services of eating house or permit room or could be visiting the establishment for the dance performance itself. The artists were, therefore, carrying on a profession in

the licensed premises which are known as place of public entertainment pursuant to the licence held by the bar owner. Their right, therefore, flows from the right of the bar owner to have a licence for dance performance. The dancers are not prohibited or restricted from dancing elsewhere. Though dancing forms a part of speech and expression, it will not be possible to hold that every dancer who wishes to perform in a licensed premises of another, if denied the right to perform, such an act would be violative of the dancers right under Article 19(1)(a). The distinction in such an event will have to be made as to what was the main object of the dancer in dancing Was the object to dance, as right to an occupation or profession or in the exercise of the right of speech or expression. That would depend on the facts and issues involved. A Lecturer in a college disseminating information to students or teaching them may be using his freedom of speech and expression, yet what he is doing in a lecture room is practising a profession. In the instant case the artistic expression of dance being prohibited in a particular establishment, which has no licence pursuant to the licence being cancelled, would not attract the right to freedom of speech and expression. On the facts of the instant case it would have to be held that the dancers presence in the premises was not with a view to espousing their right of speech or expression, but to carry on an

occupation or profession. In fact in Writ Petition (Lodging) No.2338 of 2005, the Petitioner organisations have argued that bar dancers are capable of dancing to existing Hindi films tunes. This is the only skill most of them possess and at the highest is a profession and/or vocation or occupation.

31. Thus dance performed by the dancer is not to express views held by the dancer or express their thoughts through the medium of dancing. What the dancer does by dancing is as an occupation or profession. In other words dance performed by the bar dancer would not fall within the expression speech and expression as the dancers activities are mainly to earn their livelihood by engaging in a trade or occupation. We are, therefore, of the opinion that the prohibition and/or restriction imposed does not directly interfere with the freedom of speech and expression and consequently there is no direct abridgement of the right of speech, but it incidentally interferes with such right and consequently there is no interference with Article 19(1)(a) as it would not be attracted. We, therefore, have no hesitation in holding that in the instant case on the facts involved herein,the fundamental right affected is the right to carry on an occupation or profession guaranteed under Article 19(1)(g) and not the fundamental right of speech or

expression under Article 19(1)(a). The amending Act, therefore, need not be tested as to the requirements of Article 19(2).

32. **Does the amendment violate the bar dancers right under Article 21 of the Constitution?:**

. On behalf of the petitioners, espousing the cause of the bar dancers and the bar dancers themselves , it is submitted that under Article 21 of the Constitution no person can be deprived of right to life except according to procedure established by law. The deprivation can be if there be a substantive law authorising such deprivation and the law provides for the mode for deprivation i.e. proceedings prior to deprivation. This is because the right to livelihood is a component of right to life as envisaged under Article 21 of the Constitution. **(See Olga Tellis and ors. vs. Bombay Municipal Corporation & Ors., (1985) 3 SCC 545 and Consumer Education & Research Centre & Ors. vs. Union of India & Ors., (1995) 3 SCC 42.** The ban on dance in the place of public establishment has undoubtedly taken away the bar dancers' right to livelihood. It is submitted that such deprivation can only be if the law meets the requirement of substantive as well as procedural due process. The substantive due process would be violated if (a) there is no possible alternative source for the

dancers; (b) There is no rehabilitation or adequate compensation provided for the dancers; and (c) the ban is going to affect the dancers of their livelihood. In the instant case the Legislature has not provided for rehabilitation or compensation in the amending Act. In so far as the alternative source of livelihood, it must be borne in mind that most of the bar dancers are illiterate and do not possess any other skills. The impact of the ban has directly affected their livelihood. The earnings of the bar dancers were not very high and their expenses being very high. According to the contention they have no savings to fall back upon. This has to be considered in the background that dancing as an occupation or profession is recognised as a fundamental right and until the impugned legislation came into force, it was a legitimate source of livelihood for the bar dancers, who are now rendered unemployed. While enacting a law, even if it be in furtherance of a directive principle, it cannot take away or affect what is set out in other directive principles like Article 39A which states that all citizens men and women equally have the right to adequate means of livelihood and Article 41 which states that the State within its economic capacity and development, has to make effective provision for securing the right to work, to education and to public assistance in cases of unemployment. In response to the State's contention that they will

provide for rehabilitation, it is submitted that such plan should have been before the amendment of the Act and in the absence of that the amendment cannot be rescued by subsequently formulating a scheme. It is sought to be pointed out that the statement of the State cannot be relied upon as in the past the Government inspite of making promises to rehabilitate, over 1.25 lakh mill workers rendered jobless due to closure of mills did not do so. It is also pointed out that in respect of the devastating earthquake at Latur and the 27th July, 2005 deluge in Mumbai, no effective rehabilitation measures were taken and apart from that in respect of all major projects undertaken by the Government there never has been any effective rehabilitation. Considering that and as it would be difficult to prove the identity of bar dancers, many of them who were not employees the submission should not be accepted.

33. On behalf of the State the learned Advocate General has made the following statement:-

(1) The Government of Maharashtra is aware of and sympathetic to the need to rehabilitate bar girls affected by the provisions of the Bombay Police (Amending Act) 2005. With a view to ensure their effective rehabilitation and provide them with a dignified alternative vocation, the State Government will set up a special dedicated Cell to counsel,

train and assist the bar girls to avail of the benefit of the various Government Schemes for employment including self employment so as to find an alternative vocation. This Cell shall be part of the Women and Child Welfare Department.

(2) If necessary, Government is also agreeable to set up a Special Committee to investigate into and suggest ways and means of providing a suitable dignified alternative vocation to the Bar girls who may have been displaced by the aforesaid legislation.

. The Government has also annexed the material and government resolutions showing the various schemes that are in force for providing a means to livelihood.

34. In the instant case the right to livelihood is affected on account of the direct effect of the Act, banning dancing in the prohibited establishments. The direct effect of such closure has impacted the livelihood of the bar dancers. The question which we have to really answer is, whether by such closure the right to livelihood has been taken away. We may gainfully refer to the observation of the Apex Court in Sodan Singh (supra).

The Apex Court observed as under:-

"We do not find any merit in the argument

> founded on Article 21 of the Constitution. In our opinion Article 21 is not attracted in a case of trade or business - either big or small. The right to carry on any trade or business and the concept of life and personal liberty within Article 21 are too remote to be connected together."

**In the case of Sodan Singh (supra) the issue was of hawking.** The prevention of hawking activities directly affected the right to livelihood of the hawkers. The Court accepted that the right to hawking forms a part of the expression, occupation, trade or business. It would thus be clear that Article 21 would be attracted in a case where the petitioners claim a fundamental right to carry on trade, business, occupation or profession. At the same time the Apex Court in Sodan Singh (supra) also observed as under:-

> "An alarming percentage of population in India is still living below poverty line. There are millions of registered unemployed. Government, in spite of constitutional mandate is unable to provide them with employment. But when, by gathering meagre resources, they try to employ themselves as hawkers or street traders they cannot be stopped on the pretext that they have no

right, rather the Government should render all help to rehabilitate them."

In the instant case as we have noted earlier these are women who are mostly semi-literate coming from socially and economically poor background. Many of them are widows, others have faced exploitation at the hands of their husbands or families. Still others have been unable to secure a job to maintain themselves and their families. In these circumstances even if they cannot claim right to livelihood it does not mean that while dealing with a marginalised section of the society, whose right to livelihood is taken away, the State is precluded from providing rehabilitation or taking steps for the rehabilitation. In **Neeraja Choudhary vs. State of M.P. AIR 1984 SC 1099** in the matter of rescuing the bonded workers whilst preparing a scheme for rehabilitation, the Court observed that in such matters it is necessary to involve social action groups so as to identify the downtrodden and work towards their rehabilitation. In **Vishal Jeet vs. Union of India, AIR 1990 SC 1412** the Apex Court in the matters pertaining to sex exploitation and children issued various directions to the State Government and Central Government to constitute Committees and set up welfare programmes for their benefit. In **Gaurav Jain vs. Union of India, AIR 1997 SC 3021** the Apex Court again was pleased to

issue direction for rehabilitation through various welfare measures so as to ensure their dignity of person, their means of livelihood and socio-economic empowerment. . In **Consumer Education & Research Centre & Ors. vs. Union of India & Ors. (1995) 3 SCC 42,** the issue before the Apex Court was in the matter of asbestos industry and the right of such workers to medical aid and service thereafter. The Apex Court held that in those cases where workers were found to be suffering occupational health hazards, their right to health and medical aid is a fundamental right. In so holding the Court relied upon the preamble to the Constitution, the directive principle of State Policy and Universal Declaration of Human Rights. The Court observed that if the right to livelihood is not treated as a part of the constitutional right to life, the easiest way of depriving a person of his right to life would be to deprive him of his means of livelihood to the point of abrogation. Such deprivation would not only denude life of its effective content of meaingfulness but it would make life impossible to live, leave aside what makes life liveable.

. The Committee, if it needs to be appointed, can be on the basis of the statement made on behalf of the State of Maharashatra and the direction issued in the case of **Gaurav Jain vs. Union of India, (1997) 8 SCC 114.**

35. An additional argument was advanced that because of the prohibition of dancing by the dancers in the dance bars, their right to earn a livelihood is impaired and because their right to livelihood is affected they would be vulnerable to HIV/AIDs and other STI. It is true that bar dancers constitute a vulnerable section of the marginalised society. That,however, by itself does not mean that once their right of gainful employment or carrying on an occupation or profession in a particular place is prohibited, the probability of they seeking another profession endangers their health or the right to earn a livelihood. This argument at least would not be available when a person seeks to carry on a profession or occupation of a sex worker, as sex work is recognised as immoral or an activity which is 'res extra commercium' and there can be no fundamental right to carry on an occupation or profession which is immoral as will be seen when we discuss Article 19(1)(g). Therefore, that issue will have to be examined in the context as to whether the prohibition imposed by Section 33A, has affected the right to livelihood of the bar dancers. If the argument of the petitioner bar girls are accepted, then in a case of closure of industries, loss of crops on account of famine, where the earning capacity of the person is lost, thereby affecting means of health care the right to livelihood would be infringed. This the

State provides in the form of health care in public hospitals and dispensaries and thus to a large extent takes care of the health of its citizen. The right to health is no doubt incidental to the right to life. Considering the above in our opinion that issue really does not arise.

36. **Is the impugned amendment violative of Article 14 of the Constitution of India.**

. The following contentions will have to be examined in order to answer the issue:-

(1) What is the object of the Legislation;

(2) Is the classification founded on an intelligible differentia which distinguishes persons or things that are grouped together from others left out of the group.

(3) Does such differentia have a rational nexus and/or relation to the object sought to be achieved by the Statute in question.

(4) Classification being merely a judicial formula for deciding whether a legislation or administrative action is arbitrary, is the prohibition on dancing, imposed by Section 33A unreasonable and/or arbitrary.

. We may advert to the pleadings in Writ Petition No.2450 of 2005 for that purpose. The dances, performed in various 'dance bars,' as called in colloquial language, are usually performed by artistes who imitate dances performed in various Hindi Movies. The dresses worn by dancers in these bars are usually traditional Indian Dresses like sarees, ghagra cholis or salwar kameez unlike the dresses worn by dancers in movies. Similarly the movements and gestures are far more decent and orthodox than those in movies. The dances performed in dance bars are neither obscene, vulgar nor indecent. The dance performances as held in the establishments of the members of the petitioner No.1 and as described in Writ Petition No.2450 of 2005 is as under:-

1. Girls/women wearing traditional Indian outfits like salwar kameez, sarees or ghaghra cholis etc. dance on a stage provided in the Restaurants.

2. There is no physical contact between dancers and customers.

3. Utmost precaution is taken that no customer touches any dancer.

4. Songs are played by either a live Orchestra and Band or by recorded music. The songs played are from Hindi films and neither the lyrics nor the music is changed in any manner.

5. Dancers perform in a manner similar to the dances in films and their gestures and movements are the same as those made by artistes in the songs.

6. Customers desiring to give tips, hand over the same to waiters who hand the same over to the dancers, hence there is no scope for any physical contact between dancers and customers.

7. Separate air-conditioned, changing/dressing rooms with attached toilets are provided for dancers;

8.Escorted conveyance is provided to dancers to and from their respective homes to the Restaurants.

9. Food and beverages are provided to the artistes.

. In contrast, it is set out that in

Discotheques, young boys and girls wearing hardly any clothes and revealing dresses, dance in each others arms. The said couples are known to consume alcohol and even new age drugs and all kinds of immoral activities are being openly carried on there. During Navratri festival there are programmes called Dandiya Nights where young boys and girls wearing revealing and sexy outfits, dance in proximity to each other. There are no restrictions on these youngsters about the dresses worn by them or the gestures made by them. The ban does not cover these dances. The State, it is set out, is adopting double standards by allowing these activities where indecent clothes, movements and immoral activities in the name of high society are permitted whereas, establishments where there is no physical contact are sought to be closed down. The ban seeks to completely wipe out the performance of dances which as a form of entertainment/amusement, is accessible to the common man while the same dancers can perform the same dances for the rich audiences in Three Star Hotels and above. The establishment of the petitioners are frequented by tourists from all over the world who come to watch the dance. Impressed and inspired by the dance bars of Mumbai, Restaurants and Bars having music and dance have opened up in Dubai, Singapore, London, Malasya, Muscat, Bahrein, Sri Lanka, etc. where dancers are specially taken from India and other parts of the world to perform there. The

excuse sought to be given for exempting hotels of Three Star and above categories from the ban also does not hold good. The ban which seeks to ban dancing in Restaurants and Bars alone, is discriminatory and violative of Article 14, which prescribes that the differentia has to be intelligible.

. Dances are permitted in Three Star Hotels and above and also in clubs or gymkhanas. . Entry is permitted in clubs and gymkhanas not only for members but also for their guests. They are permitted to hold dance performances. Hence although they are similarly situated to carry on business, they have been exempted from the said ban. The fact that dance performance can be permitted in Three Star and Five Star hotels and/or any Gymkhana, etc., clearly shows that the purpose is not to curb exploitation of women and/or avoid vulgarity, but the same is to promote the interests of hotels with larger resources at the cost of eating houses, permit rooms and beer bars with moderate resources, which cater to all classes of people. The amending Act, therefore, is clearly discriminatory and there is no nexus between the proposed prohibition and the intended result. The impugned amendment, therefore, has to be struck down on the touchstone of Article 14 of the Constitution of India as being clearly discriminatory. In addition in Criminal Writ Petition No.1971 of 2005,

it is pleaded that the State has not banned Tamashas.

37. On behalf of the State of Maharashtra Youraj Laxman Waghmare, Deputy Secretary, has filed an affidavit in reply. It is set out that the concept of dance bars thrived after 1980s. The owners of permit rooms and beer bars with a view to attract customers, introduced dance shows where extremely young girls many of whom are minors, started dancing to tunes of recorded music tunes. It was brought to the attention of the Government that these eating houses, permit rooms or beer bars to whom licence to hold dance performances has been granted were permitting the performance of dances in an indecent, obscene and vulgar manner. The dancing girls invariably used to be clad in dresses, apparently for name's sake traditional, but truly revealing female anatomy. These girls would dance in a peculiar manner with constant eye contact with certain customers and with such body movements so as to attract the attention of customers and entice them, so that they would be showered with currency notes by the customers. There used to be virtually a competition amongst the dancing girls to attract the attention of the customers so as to be showered with the maximum amount of currency notes. These girls were found to be using various tactics to lure the customers and attract their attention. With the kind of cash money that was being generated every night

after night after night at such places, the dance bar activity started being afflicted by various crimes and became pick up joints for prostitution by the bar girls. The group of female dancers mingle with the customers sitting in these restaurants and bars or even in the passages, on the loud and sensuous music. During the dance performance, these female dancers come close and in physical contact with the customers present. They deliberately dance in such a manner so as to lure the passion of the customer in a derogatory manner in order to solicit handsome cash rewards in return. The dance steps are vulgar and of a manner that are unknown to any known or established dance form and is performed with the sole objective of rousing the physical lust amongst the customers present. The customers in that state are being provoked and prompted to shower the currency notes. The bar owners provide the facility of changing large currency notes of Rs.500/- or Rs.1000/- into bundles of Rs.10/-, or Rs.50/- or Rs.100/- to the customers. The customers would then themselves stand next to the girls while they were dancing and shower these currency notes on the girl who they fancied. After showering notes, the waiters and employees of the bar, after each song was over, would pick up the currency notes from the floor and stash them away. The money which was showered would be shared between the bar owners and the dancers in varying ratios depending from dance bar to dance bar.The customers

who showered the money would very often be favoured for extra attention by the dance girls. The sole object of conducting these dances was not amusement, but collection of huge cash from the customers, which was thereafter shared between the dancers and the bar owner. These dance performances were neither entertainment nor art. Many of these establishments were running beyond the time prescribed and invariably permitting indecent dance performances. Establishment of such place of public entertainment having such performances were creating numerous problems including problems of law and order. Performance of these dances were nothing but exploitation of women at very young age many of whom were minors. With the object to prevent the eating houses, permit rooms or beer bars from conducting dances which were derogatory to the dignity of women and to prevent depravity, corruption or injury to public morality or morals, the said amendment has been brought about. Complaints had been received to point out that under the guise of dance bars prostitution was being conducted in the places. Bar owners were exploiting the bar girls for commercial gain. Many dance bars were situated on the ground floor of residential buildings and women and young girls from the building were subjected to daily harassment, stress and mental trauma whenever they returned home in the evening or late at night after dinner, etc., to face a crowd of lascivious men

customers who would hang around in and outside the dance bars and make indecent comments and gestures. Various cases were registered under the PITA Act as also under Section 294 of I.P.C. Number of offences were also committed in dance bars and also vicinity thereof. It is thus averred that the Legislature has treated dance performance being conducted in eating houses, permit rooms or beer bars as a separate class by itself. At the exempted establishments also, such performances are not being permitted under Section 33(B). The dominant object of the amended Act is to prevent dance performances which are derogatory to the dignity of women and likely to deprave, corrupt and injure the public morality and morals. The exempted establishments are also not permitted to conduct any form of such dances, which are derogatory to the dignity of women and likely to deprave, corrupt and injure the public morality and morals. In the exempted establishments also such dance performances are not going to be permitted even under Section 33(B). The exemption to these establishments in other words is not an indirect licence to the exempted establishments to perform dances as in the prohibited establishments but to conduct performance by persons who have acquired skill in western classical and Indian classical dance forms. The exempted establishments are subjected to the conditions of obtaining necessary permission, licence from various authorities for each performance they

intend to hold in their establishments. The authorities have an opportunity to screen and supervise the nature of performances in these establishments. The exemption for holding dance performances in the three starred or above hotels is with the object of encouraging tourism and the same is in consonance with the tourism policy of Central and State Government. Even otherwise five star hotels are a class by themselves and cannot be compared with dance bars. It is a distinct category. The persons visiting these hotels or establishments stand on different footing and cannot be compared with people who attend the establishments which are popularly known as dance bar. They belong to different strata of society and are class by themselves. There are only six such star hotels, holding licence and covered by the exemption provided under Section 33(B) of the amended provisions. The class of establishment covered by Section 33(B) are those conducted by responsible persons/management who are conscious of their social commitments and obligations. These are the types of establishment, which have never conducted any activity of the kind that was being conducted at the dance bars. The establishments covered by Section 33B are clearly distinguishable and separable from the establishments of dance bars. If the object of the amendment is taken into consideration it will be clear that the dance performances that may be conducted at

establishments covered by Section 33(B) are not like the one that are intended to be prohibited by the impugned amendment.

38. In rejoinder on behalf of the petitioners the allegations as set out in the affidavit in reply of Waghmare have been denied. It is set out that a perusal of the gestures and dance performance in the exempted establishments, would prove beyond reasonable doubt that the respondents were adopting hostile attitude towards the dance bars and the allegations about indecency and vulgarity are all aimed at the petitioners members, whereas obscene and indecent activities in the form of fashion shows and beauty pageants, dance and performances by dance troupes from abroad are considered to be 'decent' only because the Venue is in Star Hotels and High Class places which are visited by film stars, the very rich and elite families.

. The averments and pleadings of the petitioners in the other petitions are more or less same or similar and hence need not be adverted to.

39. Before dealing with the challenge we may briefly consider the law on the touch stone of the test of classification. We may set out some of the tests as were reiterated by the Apex Court in **Shashikant Laxman Kale & Anr. vs. Union of India &**

**Anr., (1990) 4 SCC 366,** by quoting from the decision in Re the Special Courts Bill, 1978:-

> (a) The State, in the exercise of its governmental power, has of necessity to make laws operating differently on different groups or class of persons within its territory to attain particular ends in giving effect to its policies, and it must possess for that purpose large powers of distinguishing and classifying persons or things to be subjected to such laws.
>
> (b) The constitutional command to the State to afford equal protection of its laws sets a goal not attainable by the invention and application of a precise formula. Therefore, classification need not be constituted by an exact or scientific exclusion or inclusion of persons or things. The Courts should not insist on delusive exactness or apply doctrinaire tests for determining the validity of classification in any given case. Classification is justified if it is not palpably arbitrary.
>
> (c) The principle underlying the guarantee of Article 14 is not that the same rules of law should be applicable to all persons within

the Indian Territory or that the same remedies should be made available to them irrespective of differences of circumstances. It only means that all persons similarly circumstanced shall be treated alike both in privileges conferred and liabilities imposed. Equal laws would have to be applied to all in the same situation, and there should be no discrimination between one person and another if as regards the subject-matter of the legislation their position is substantially the same.

(d) The law can make and set apart the classes according to the needs and exigencies of the society and as suggested by experience. It can recognise even degree of evil, but the classification should never be arbitrary, artificial or evasive.

(e) The classification must not be arbitrary but must be rational, that is to say, it must not only be based on some qualities or characteristics which are to be found in all the persons grouped together and not in others who are left out but those qualities or characteristics must have a reasonable relation to the object of the legislation. In order to pass the test, two conditions

must be fulfilled, namely, (1) that the classification must be founded on an intelligible differentia which distinguishes those that are grouped together from others and (2) that that differentia must have a rational relation to the object sought to be achieved by the Act.

(f) The differentia which is the basis of the classification and the object of the Act are distinct things and what is necessary is that there must be a nexus between them. In short, while Article 14 forbids class discrimination by conferring privileges or imposing liabilities upon person arbitrarily selected out of a large number of other persons similarly situated in relation to the privileges sought to be conferred or the liabilities proposed to be imposed, it does not forbid classification for the purpose of legislation, provided such classification is not arbitrary in the sense abovementioned.

(g) Classification necessarily implies the making of a distinction or discrimination between persons classified and those who are not members of that class. It is the essence of a classification that upon the class are cast duties and burdens different from those

resting upon the general public. Indeed, the very idea of classification is that of inequality, so that it goes without saying that the mere fact of inequality in no manner determines the matter of constitutionality."

40. The submissions on behalf of the petitioners may now be briefly set out.

. Section 33(B) of the impugned act seeks to exempt certain establishments from the ban imposed under Section 33A. Hence the mask of purported immorality alleged against the bar dancers can continue in the establishments exempted under Section 33(B). The differentia must have a rational relation to and should have a nexus to the object sought to be achieved by the statute. No conditions have been prescribed in respect of the establishments covered under Section 33(B). The same rules and regulations which governed the banned establishments are alpplicable to the exempted establishments. As a result the same dancers who are prohibited from performing the same dance in a prohibited establishment are permitted to dance in the exempted establishments. The purported immorality gets converted to virtue by a mere change of locus. For breach committed by the Licensees in the category of Section 33(B) at the highest their licences can be cancelled, but in case of the petitioners' members

the business is completely closed. There is a discrimination between the dancers in various establishments and the distinction sought to be made amounts to micro distinction between the class of dancers who in terms of dancing are a homogenic lot and class by themselves. **(See A.V. Channaiah vs. State of A.P. & Ors.2005 1 SCC 294)**. The object of the impugned legislation as the State has urged is to prohibit obscene, indecent and vulgar dance performance. Section 33A and 33B have created two classes of establishments. The net result is that dance which is not obscene, vulgar and indecent is not prohibited in the exempted establishment under Section 33B whereas dancing in any form including which is not obscene, vulgar and indecent is prohibited in all establishments covered under Section 33A. Equality is the basic feature of the Constitution and any treatment of equals unequally, or unequals as equals would be violative of Article 14, as the Article bars discrimination and prohibit discriminatory laws. Section 33A discriminates between artists i.e. dance girls dancing in dance bars and Tamasha theatre and at the same time discriminates between the viewers visiting dance bars and Tamasha. Criminal cases under Section 110 of the Bombay Police Act as also under Section 294 of the I.P.C. have been registered against the Tamasha theatre. If the object of prohibiting dance performance in a dance bar was to prevent

exploitation of women or women trafficking such object cannot be achieved so long as Tamasha theatre, three star and other exempted establishments are allowed to hold dance performances. There was no material before the legislature in support of banning dance bars or permitting Tamasha theatre and dancing in other exempted establishments. There can be no different standards of morality for the affluent and the rich for availing the means of entertainment in the exempted establishments and any common person who can afford to visit place of entertainment within their reach. Reliance is placed in the case of **Charanjit Lal vs. Union of India, AIR 1951 S.C. 41**; to the Judgment in **Shri Ram Krishna Dalmia vs. Shri Justice S.R. Tendolkar & Ors., AIR 1958 S.C. 538,** as also to the **State of U.P. Vs. Kaushalya & Ors., AIR 1964 S.C. 416.**

41. The entire argument of the petitioners proceeds on the footing that there is no rationale for exemption in favour of the exempted establishments as both are similarly situated and consequently Section 33A is violative of Article 14 of the Constitution. A perusal of para.31 to 34 of the reply filed by Youraj Laxman Waghmare shows that there are only six Hotels from the exempted category which have got public entertainment and public amusement licence. No complaint of any kind has been received against those six institutions. Is it

possible to classify the establishment based on the type of dance being performed in the establishments? If the classification is possible then does it have a rational nexus with the object of the amending Act.

42. In a challenge to a legislation under Article 14, there is no question of application of mind or non-application of mind by the Legislature to the material. Also there can be no question of malafides or lack of good faith on the part of the legislature whilst enacting the law. Even though the executive in a given case may have an ulterior motive in moving a legislation that cannot render the passing of the law malafide. (See **K. Nagaraj vs. State of A.P. & Ors., AIR 1985 S.C. 551.** If a reform is introduced it can be done gradually. Not including all does not make including some invalid. Javed & Ors. Vs. State of Haryana (2003) 8 S.C.C. 369. While considering a challenge to the constitutionality of a provision, the Courts must bear in mind that there is always a presumption in favour of the constitutionality of an enactment and the burden is upon him who attacks it to show that there has been a clear transgression of the constitutional principles. It must be presumed that the Legislature understands and correctly appreciates the need of its own people, that its laws are directed to problems made manifest by experience and that its discriminations are based on adequate grounds. The Legislature is free to

recognise degrees of harm and may confine its restrictions to those cases where the need is deemed to be the clearest. In order to sustain the presumption of constitutionality the Court may take into consideration, matters of common knowledge, matters of common report, the history of the times and may assume every state of fact which can be conceived existing at the time of legislation. While good faith and knowledge of the existing conditions on the part of a Legislature are to be presumed, if there is nothing on the face of the law or the surrounding circumstances brought to the notice of the Court on which the classification may reasonably be regarded as based, the presumption of constitutionality cannot be carried to the extent of always holding that there must be some undisclosed and unknown reasons for subjecting certain individuals or corporations to hostile or discriminating legislation. It is settled law that there can be no objection to material being brought to the notice of the Court by an affidavit along with what is specified in the preamble and the statement of object and reasons of the statute itself, in order to ascertain whether there was any valid basis for treating those covered by the Act or excluded by the Act as a distinct class by itself.

43. The initial burden to prove that the classification is unreasonable and/or has no nexus

with the object sought to be achieved is on the petitioners. The petitioners have to allege and establish by cogent material that other persons or establishments similarly situate, have been left out and the petitioner and their establishments have been singled out for discriminatory and hostile treatment. (**See Shri Ram Krishna Dalmia & Ors. vs. Shri Justice S.R. Tendolkar & Ors.(supra)**. Once the initial burden is discharged the State will have to satisfy the Court that the twin tests are satisfied. This finds support in the Constitution Bench judgment of the Apex Court in **D.S. Nakara & Ors. Vs. Union of India, (1983) 1 SCC 305** which has been followed in **B. Prabhakar Rao & Ors. Vs. State of Andhra Pradesh & Ors. 1985 (Supp.) SCC 432** and in **State of Maharashtra vs. Manubhai P.Vashi & Ors. (1995) 5 SCC 730.** It may be noted that in Nakera (supra) the Court noted that Article 14 does not merely forbid discrimination, but the Act must not be arbitrary.

. The rule of parity is the equal treatment of equals in equal circumstances. The rule of differentiation is enacting laws differentiating between different persons or things in different circumstances. The circumstances which govern one set of persons or objects may not necessarily be the same as those governing another set of persons or objects, so that the question of unequal treatment does not really arise between persons governed by

different conditions and different sets of circumstances. The principle of equality does not mean that every law must have universal application for all persons who are not by nature, attainment or circumstances in the same position and the varying needs of different classes of persons require special treatment. The rule of classification is not a natural and logical corollary of the rule of equality, but the rule of differentiation is inherent in the concept of equality. Equality means parity of treatment under parity of condition. Equality does not connote absolute equality. A classification in order to be constitutional must rest upon discriminations that are substantial and not merely illusory. The test is whether it has a reasonable basis free from artificiality and arbitrariness embracing all and omitting none naturally falling into that category. (**See State of Kerala & Anr. Vs. N.M. Thomas & Ors., 1975 (2) SCC 310).**

. While considering the validity of legislation as we have noted earlier it is open to the State to file affidavits and it is for the Courts to consider the same. However, the validity of the legislation is not to be judged merely by affidavits filed on behalf of the State, but by all the relevant circumstances which the Court may ultimately find and more especially by what may be gathered from what the legislature has itself said. Courts are not really

to concern themselves with the hollowness or the self-condemnatory nature of the statements made in the affidavits filed by the respondents to justify and sustain the legislation. The deponents of the affidavits filed in the Court, may speak for the parties on whose behalf they swear to the statements. They do not speak for the Legislature. Once a statute leaves the Legislative House, the Court is the only authentic voice which may echo (interpret) the interest of the Legislature. This the Court will do with reference to the language of the statute and other permissible aids. (**See Sanjeev Coke Manufacturing Company vs. M/s.Bharat Coking Coal Ltd. & Anr., AIR 1983 SC 239).**

44. An argument was advanced that the establishments which are prohibited under Section 33A and those which are exempted under Section 33B constitute a class by themselves in as much as in all these establishments liquor, beer and wine are sold. The establishments have common characteristics. It was,therefore, not open to the State to make mini classifications amongst persons in the same group and for that purpose reliance was placed on the judgment of the Apex Court in **E.B. Chinnaiah vs. State of A.P. & Ors., (2005) 1 SCC 394**. In that case the State of A.P. had enacted a legislation for sub-classifying Scheduled Castes into sub-divisions. The Court was examining whether such a sub-division

within a class is permissible. The Court noted that all the castes in the Schedule are deemed to be a class. The issue, therefore, was whether further classification amongst a class of scheduled castes for the very same object of providing reservation is permissible and if so, would it stand the test of Article 14 of the Constitution. Relying on the observation in the case of State of **J. & K. v. Triloki Nath Khosa, AIR 1979 SC 1,** the Court held that as members of scheduled caste form a class by themselves any further sub classification would be impermissible. While applying the principles of classification the Court quoted the observations from Triloki Nath Khosa, that mini-classifications based on micro-distinctions are false to our egalitarian faith and only substantial and straightforward classifications plainly promoting relevant goals can have constitutional validity. To overdo classification is to undo equality. The Court then held that the castes are recognised pursuant to the Presidential Notification deserving of special protection and once the constitution itself has recognised the castes, it was not open for the State to make a further sub classification.

. In the instant case what the Legislature has done is to recognise the establishments having an eating house, permit room or beer bar into two distinct classes. The classification unlike in the

case of E.B. Chinnaiah is not based on a constitutional requirement. The classification is based on the type of dancing in the establishment which has a license for a place of public entertainment and another license for a place of public amusement. Such a classification is permissible. See **State of Kerala and Anr. vs. N.M. Thomas (1976) 2 SCC 310,** where Mathew J., observed that it is a mistake to assume that there can be no classification within a class. If there are intelligible differentia which separate a group within that class from the rest and that differentia has a nexus with the object of classification, there is no objection to a further classification. However, such classification must meet the tests as set out earlier bearing in mind the nexus with the object of the Act.

45. The judgment of the learned Division Bench of the A.P. High Court was relied upon on behalf of the petitioners in the case of **Big Way Bar & Restaurant and etc. vs. Commissioner of Police, Hyderabad and Anr., 2003 Cri. L.J. 1360**. In that case the power was conferred on the Commissioner to grant licences under the Hyderabad Public Amusement Rules. The Commissioner on the ground that some of the licences were conducting dance in an obscene manner and cases were booked against them for violation of conditions of license, imposed total prohibition prohibiting music and singing and dances in some establishments

while permitting dancing in other establishments. The establishments where licence could be granted for music, singing and dancing were the four star and five star hotels. It may be noted that in that case, it was an exercise of power by the Commissioner, who on account of activities in a class of bars took a policy decision of imposing total prohibition. It further appears that no material was placed by the State in support of the classification. In the present case it is the legislature which has categorised the establishments having licences for eating houses, beer bars or permit rooms into two different classes. In paragraph 65 of the judgment, the Court recorded a finding that neither the Act nor the rules empower the Commissioner of Police to completely prohibit conduct of singing, music and dance programmes, in public places of amusement in the interest of general public. The power conferred on the Commissioner was to refuse to grant a licence if, in his opinion, they are obscene or immoral. It would thus be clear that the Commissioner though had the power to frame the scheme for providing guide-lines for running bars and restaurants and providing punitive measures, had no power to totally prohibit or restrict as has been done by the legislature in the instant case and as such the policy decision to prohibit dancing or music and singing in a class of establishments was held to be arbitrary. Though the judgment could be

distinguished on the ground that there was no power in the Commissioner, the observation quoted below will have relevance in deciding the controversy in issue. Dr. AR. Lakshmanan, J. (as his Lordship then was) speaking for the Division Bench in the case of exercise of discretion by the Police Commissioner prohibiting dance in a challenge under Article 14 observed as under:-

> "The policy decision of the respondents would be unreasonable and cannot be sustained for yet another reason. By reason of the impugned policy decision not to grant any amusement licences to any bars and restaurants in the state other than four star and five star hotels, an unreasonable classification has been made between the two sets of categories or hotels or restaurants. There is no guarantee that the four star and five star hotels will not indulge in such activities. We are unable to comprehend what object the State would like to achieve by making such classification. The activity in both the categories of hotels/restaurant is one and the same. As rightly contended by the learned Counsel appearing for the petitioners the classification made by the respondents between four star and five star hotels as one group and the other star hotels

as other group is not a reasonable classification as in both the cases the permission relate to only music, signing and dancing. The action of the respondents, in our considered opinion, would amount to selective discrimination, offending the provisions of Article 14 of the Constitution of India. The classification is not founded on an intelligible differentia and there is no rational relation to the object sought to be achieved by the policy decision under challenge. As already indicated above, there is no guarantee that the four star and five star hotels will not indulge in prohibited activities. Further, the Act nor the Rules framed thereunder allow such classification between the same set of persons."

46. We may now examine whether the petitioners have prima facie discharged the burden placed on them to show that the classification is not founded on any intelligible differentia. The classification may be based on conditions which are geographical or according to object or occupation or the like. The contention on behalf of the State and as argued before this Court by the Advocate General sets out that the impugned Act is aimed at prohibiting activities which are harmful and/or have a tendency and capacity to be even more harmful to public morals

and morality and exploitation of women and the legislature has, therefore, in its wisdom taken a conscious decision. The object of the impugned legislation is to prohibit dances which are vulgar, obscene, indecent and as such derogatory to the dignity of women and are likely to deprave, corrupt and injure public morality and morals and further exploitation of women.

. In the instant case, material had to be placed by the petitioners, to show that dance as performed in the banned establishments were also being performed in the exempted establishments and or the nature of the dance performed is irrelevant. From the material placed on behalf of the Commissioner of Police it would be clear that number of licences issued in so far as the banned establishments was 345 and in so far as exempted establishments are only six. The petitioners, however, contend that there are atleast another 1000-3000 establishments in which bar dancing is going on and whose applications are pending before the Competent Authority either pursuant to orders of the Court or otherwise. This is seriously disputed on behalf of the State. Whatever be the position they belong to the class of banned establishment. The exempted establishments having a P.P.A. license as demonstrated by the figures are negligible. Dancing is both an art and a form of relaxation.

Dancing may partake of various forms. Couples may dance together to relax or for entertainment of others. Skate dancing as a sporting activity is one illustration. Ballroom dancing another. There are then other various forms of dancing embedded in the culture of our regions. There could be a dance performance by a homogenous groups of males and/or females and or a heterogeneous group of female and male dancers, watched by a participating audience and or the like. The case of the petitioners themselves is that in their establishments, what is being performed are dances copied from Hindi films. In other words a species of dance. The State has placed material on record in the form of reports and the affidavit of Waghmare to show that dancers in the prohibited establishments are being showered by cash, which money was collected and shared and appropriated not only by the dancers themselves, but shared between the owners of the establishments and the dancers in varying percentages. Though there has been denial by petitioners in Writ Petition No.2450 of 2005, nonetheless the specific averments by the State have not been specifically denied. Apart from that, the reports of Prayas and Chapekar would clearly indicate that money is being thrown at the bar dancers which is collected and shared between the bar dancers and the bar owners. In other words the owners of the establishment were themselves getting a percentage of money from the dance performance of the

dancers. The State's contention is that such conduct of dance is not amusement, but collecting of large amounts of cash from the customers. It will not be possible to accept the case of the State that this would not amount to dancing. The fact, however, would remain based on the various reports including S.N.D.T. and Prayas that the persons who visit the establishments of the petitioners atleast some of them either voluntarily or otherwise part with money, as the hotel owners themselves have made arrangements to exchange high currency notes into low currency notes. The money collected by the dancing girls is shared between the girls and the bar owners in varying percentage. It would thus be clear that the type of dancing in the banned establishments has its own characteristics. It cannot, therefore, be said that the classification of the establishments in which a particular type of dance is being performed does not constitute two distinct classes and/or amounts to mini classification amongst dancers and consequently would be contrary to Article 14 of the Constitution. We have earlier set out that the object was to ban dance performances which tend to deprave, corrupt and injure public morality and morals and are thus derogatory to the dignity of women. From the S.O.R. the other object is exploitation of women. As women other than dancers can work in the dance bars, the object would be exploitation of women dancers.

. The dances performed, therefore, in the prohibited establishments have a characteristics and traits of their own and can be said to constitute a distinct class by themselves. The classification need not be scientifically perfect or logically complete or which may satisfy the expectations of all concerned. In **Welfare Association, A.R.P. Maharashtra & Anr. Vs. Ranjit P. Gohil and Ors., (2003) 9 SCC 358.** The Apex Court observed as under:

> "It is difficult to expect the legislature carving out a classification which may be scientifically perfect or logically complete or which may satisfy the expectations of all concerned, still the court would respect the classification dictated by the wisdom of the legislature and shall interfere only on being convinced that the classification would result in pronounced inequality or palpable arbitrariness on the touchstone of Article 14."

. We thus hold that the exempted establishments and prohibited establishments constitute two distinct classes based on the type of dance performance. The S.O.R. and the amendment itself, indicate the basis of the classification on the type of dance performed in the establishments. The establishments have not

been closed down or prevented from obtaining a licence for place of public amusement. The prohibition is limited to the type of the dance performed in the prohibited establishments. The State, therefore, has treated the prohibited establishments as a class by itself, distinct from the exempted establishments.

47. Another argument advanced on behalf of the petitioner is that respondents have clubbed all disparate forms of dances that are performed in the banned establishments both decent and indecent in one class and this by itself would be violative of Article 14 of the Constitution of India. It is submitted that while all forms of dancing whether decent or indecent is prohibited in the banned establishments the dancing whether obscene, vulgar or indecent performances are not prohibited in three star and above hotels and it is for the State to appropriately satisfy that the twin tests have been satisfied. In the reply filed by Waghmare in Writ Petition No.2027 of 2005, it is set out that the exemption is for holding dance performance in sports clubs, gymkhana and three star and above grade of hotels by the renowned national and international artists having acquired skills in the Western classical and Indian Classical dance forms. As the petitioners themselves have pointed out, for having a dance performance, a licence has to be obtained. The

license imposes conditions which bars indecent and/or immoral dancing. There can, therefore, be no question, of the State permitting dance in the exempted establishments which are immoral or vulgar. The submission, therefore, on the part of the petitioners that the State has clubbed all dancing both decent or indecent in the prohibited establishments whilst allowing all forms of dances in establishments which are exempted, really does not arise as there cannot be dancing which is immoral or vulgar in any establishments. The classification is being upheld in view of the traits and characteristics of the dance and not on the basis whether it is vulgar or indecent.

48. The issue still remains and which requires to be answered is whether the legislation prohibiting all forms of dancing in the prohibited establishment is arbitrary, as classification is merely a judicial formula for testing whether the legislation is arbitrary. Merely because there are two identifiable classes will not satisfy the other requirement that the classification has to have a reasonable nexus with the object of the legislation. If the object of the legislation is to prohibit dances which are immoral, indecent, obscene being derogatory to woman and or which exploit women, then how can a dance which is not immoral, indecent, obscene and which does not exploit women, be prohibited.

. Classification, by itself is not sufficient to relieve a statue from satisfying the mandate of the equality clause of Article 14. To be within its reach it must be demonstrated that the classification is based on an exercise of intelligent care and deliberation and bears a close nexus with the object and is not arbitrary. The Act has treated the distinct nature of dances performed in the two establishments for the purpose of a valid classification. The Act however, does not only prohibit the type of dance, based on which classification is upheld, but it goes on to prohibit all forms of dancing in the prohibited establishments. Was it permissible for the Legislature to prohibit all forms of dancing in the prohibited establishments irrespective of the type of the dance, for example, the same or similar dances that are being permitted in the exempted establishments. That burden the State must discharge both on the ground that it does not discriminate between the two classes of establishments but also that it is not arbitrary. How is a person having a licence for a place of public entertainment which may be upto a Grade II Hotel, different from a person who is having a licence for a place of public entertainment of Grade III and above as also a Club, etc. Grading of the hotel depends on the money invested to provide facilities to the customers.

Waghmare in his affidavit states that the kind of persons visiting the Three Star hotels, clubs and other establishments which are exempted are different and the owners of such establishments are known for their social responsibilities. Waghmare was perhaps not aware of what the Apex Court noted in **Gaurav Jain vs. Union of India & Ors.,1997 8 SCC 114** in the matter of prostitution in five star hotels. This is what the Apex Court said:

> "Prostitution in five-star hotels is a licence given to persons from higher echelons."

This has only been set out to point out that activities which the banned establishments are accused off are also indulged in the exempted establishments, in spite of the so-called strata of society who visit them or in Waghmare's words that they are socially conscious or responsible. Waghmare's affidavit further sets out that it is only dances which are not vulgar or obscene which only will be allowed to be performed in the exempted establishments. The provisions for controlling obscene and vulgar dances are the same, whether they be in the prohibited establishments or exempted establishments.

49. We may at this stage note that arguments were advanced as to what is obscenity. For the purpose of our discussion we may only refer to the judgment of the Apex Court in **Ranjit D. Udeshi v. The State of Maharashtra, AIR 1965 SC 881.** The Apex Court has noted that the test of obscenity as laid down by Cockburn C.J., has been unformally applied in India.

The test is:-

> "....I think the test of obscenity is this whether the tendency of the matter charged as obscenity is to deprave and corrupt those whose minds are open to such immoral influences, and into whose hands a publication of this sort may fall....It is quite certain that it would suggest to the minds of the young of either sex, or even to persons of more advanced years, thought of a most impure and libidinous character."

It is thus clear that stress is laid on the expression 'tendency to deprave and corrupt'. Admission to the prohibited establishments as also the establishments which have a liquor permit or beer bar is 25 years or 21 years respectively and voluntarily. In other words it is only an adult audience, who can frequent the place of public entertainment having a performance licence to witness the dance. The test, therefore, would be whether

those dances in the minds of those who visit those establishments can be said to have a tendency to deprave and corrupt. The test of obscenity and vulgarity will therefore, have to be judged from the standards of adult persons who voluntarily visit these premises. That does not mean that because only adults frequent these premises the State cannot impose restrictions. It has so done by making Rules and it is within its competence to impose reasonable restriction.

50. The Rules for licensing made under the Bombay Police Act impose conditions to ensure that the dance performance held are not obscene or against public morals. The State, wherever there has been violation of the terms of license has taken steps. Neither the S.O.R. or the Preamble or the provisions of the Act or the call attention motion, indicate that the existing mechanism was not sufficient to prohibit dances in the banned establishment. When the desire was felt of putting additional restriction a Committee was appointed which framed guidelines. The Government directed the rule making Authorities to notify the guidelines into Rules which was not done. There is also power to suspend and cancel the licence. The State from the material produced on record has so acted. In these circumstances must the establishments amongst the prohibited establishments who have acted within the bonds of law be treated in

the same manner with those who may have breached the law? Even amongst those who may have breached hte law, but whose licences has not been cancelled, must they be prohibited from having similar dances as in the exempted establishments. Amongst those who violated the terms of the licence, the competent authorities in most cases did not feel the need to cancel the performance licence, but suspended the licence or issued a warning. This indicates that the dance performance was not such as to be derogatory to women or immoral warranting cancellation of licence. If, therefore, the kind of dance performed is the basis of valid classification then how does the State justify the prohibition of all forms of dancing in the prohibited establishment.

51. Exploitation of women is a very wide expression. If the S.O.R. is considered, what it sets out is that there were complaints from people's representatives and members of the public that young girls desirous of earning easy money were frequenting these dance bars and that such girls are involved in immoral activities. If that was a reason for prohibition, then it cannot be explained why in the same place of public entertainment, women can work as waitresses, singers or other allied jobs. In these circumstances it was the duty of the State to establish that women dancers alone are being exploited and not the other women working in those

establishments and/or that the dancers alone amongst the women who work in the establishments are involved in immoral activities. The impairment of fundamental right is dictated by the nature of the right, the impact on the aggrieved party and the degree of harm resulting from the said action. Impairment of the right of the individual and not the object of the Statute in taking the impugned action is the major test. It may be noted that we have proceeded on the presumption that the legislation is constitutional and that the burden of establishing that the Legislature has transgressed the constitutional mandate is always on the person who challenges the vires. The aforesaid principle is, however, subject to the exception that if a citizen is able to establish that Legislature has invaded a fundamental right, then the State to support the law must place cogent material in order to save the law. Extensive reference has been made to the preamble and the S.O.R. The validity of the Legislation is also being tested under Article 19(1)(g) which also requires that the restriction must be reasonable. We may consider the test in such a case by referring to the Judgment of the Apex Court in **Collector of Customs vs. Sampathu Chetty, AIR 1959 Madras 142.** The Apex noted that:-

> "No doubt, there are situations when the points regarding a violation of Article 14

and an objection that a restriction is not reasonable so as to conform to the requirements of Article 19(5) or (6) may converge and appear merely as presenting the same question viewed from different angles. Such, for instance,are cases when the denial of equality before power vested, say, in an administrative authority to affect rights guaranteed to a citizen is arbitrary, being unguided or uncanalised. The vesting of such a power would also amount to the imposition of an unreasonable restriction on the exercise of the guaranteed right to trade or carry on a business, etc. Where, however, there is guidance and the legislation is challenged on the ground that the law with the definite guidance for which it provides has oustepped the limits of the Constitution by imposing a restraint which is either uncalled for or unreasonable in the circumstances, the scope and content of the equality is far removed from the tests of conformity to rational classification adopted for judging whether the law has contravened the requirement of equal protection under Article 14."

For the present we will confine ourselves to the test of discrimination under Article 14 as the

reasonability of the restriction, will be separately examined in the context of Article 19(1)(g) though the test on occasions may overlap.

52. The Petitioners, having licence for place of public entertainment have been able to establish that the effect of the amendment impairs their fundamental right to carry on their trade or business and the dancers their occupation or profession. The State had to produce material to satisfy this Court that its action was not arbitrary and/or not discriminatory. The distinction sought to be made by the State based on the class of the establishments and the kind of persons who frequent the establishments or those who own them cannot be supported by law or by our constitutional philosophy. The financial capacity of an individual to pay or his social status is repugnant to what the founding fathers believed when they enacted Article 14 and enshrined the immortal words, that the State shall not discriminate. The law for application of a licence both for place of public entertainment and or performance makes no such distinction. All who apply must meet the same tests. The classification has been upheld on the ground of the distinct type of the dance performed in the prohibited establishments. If the dances, therefore, which are permitted in the exempted establishments are also permitted in the banned establishments then, considering the stand of

the State, they would not be derogatory to women and or amount to exploitation of women and are unlikely to deprave or corrupt public morals. By using the expression western classical or Indian classical in the affidavit is of no consequence, as the Act and the rules recognize no such distinction. All applicants for a performance licence have to meet the same requirements and are subject to the same restrictions. We are, therefore, unable to understand as to why non-vulgar and non-obscene dances cannot also be permitted in the prohibited establishments as they are still entitled to obtain a performance licence. If women can work other than as dancers and that does not amount to exploitation, then how is it that it becomes exploitation, when women dance to earn their livelihood. There is no material to justify the basis for a conclusion, that there is exploitation. If the test is now applied as to whether the classification has a nexus with the object, we are clearly of the opinion that there is no nexus whatsoever with the object. Treating establishments entitled to a performance licence differently, even though they constitute two distinct classes, would be discriminatory as also arbitrary, considering the object of the Act. Section 33A and consequently Section 33B have, therefore, to be held to be void being violative of Article 14 of the Constitution of India.

53. **The Challenge under Article 19(1)(g) by the Bar Owners and Bar Dancers:**

. The challenge can be formulated as under:

1. Section 33A in as much as it prohibits all dances in the establishments of the bar owners amounts to a total prohibition and is violative of their right to carry on trade and business under Article 19(1)(g) of the Constitution of India.

2. Banning dancing in any form in the establishments prohibited under Section 33A deprives the dancers in those establishments of their right to carry on an occupation or profession and as such amounts to a total prohibition to carry on their occupation or profession and is consequently violative of Article 19(1)(g) of the Constitution of India.

3. If the prohibition on the facts, amounts to a restriction then the restriction is not reasonable and in the interest of the general public.

51. We may now set out the submissions as urged on behalf of the petitioners Bar Owners in Writ Petition No.2450 of 2005. Their learned Counsel has submitted as under:-

. The purpose for which total prohibition is clamped can be achieved if the relevant authorities carry out their duties by carrying out inspection and effectively securing the compliance of the existing rules. Failure on the part of the concerned authorities to perform their duties cannot justify the imposition of a total prohibition. Conducting a place with music and dance for amusement is an activity which is res-commercium. However, activities which are res-extra commercium cannot be carried on by any citizen. Being inherently harmful, a citizen has therefore no fundamental right to do such trade. Dance performance being res commercium is a part of the petitioners right to carry on business and it can be regulated, but not prohibited by the State. The State itself by letter dated 16th July, 2004 had suggested measures for amending the Rules for exercising control on Hotel establishments presenting dance performances. Despite the communication no action has been initiated by the concerned Licensing Authorities to amend the Rules. To impose prohibition there must exist very exceptional reasons and there must be scientifically collected data See **Hashmutulla vs. State of M.P. (1996) 4 SCC 321.** A Writ Court in considering the data has to be very careful in deciding what data should be accepted and relied upon. It is further submitted that the ground of trafficking introduced at the time of hearing is not contained either in the

object or reasons clause or in the preamble or in the call attention motion and it is an afterthought to achieve the harsh action of imposition of a total prohibition. However, when the exercise of a fundamental right is prohibited the burden of proving that the total ban alone will ensure the maintenance of the general public interest lies heavily upon the State.

54. In Writ Petition No.2052 of 2005 it is submitted that the State has to produce all material on the basis of which it seeks to justify the necessity of its legislation and the extent of the restriction sought to be imposed on the citizens Fundamental Rights. In other words the reasonableness of the restriction is required to be established by an evaluation as to:-

(1) The direct and immediate impact of the restraint /legislation on the fundamental rights of the citizens affected thereby.

(2) The inherently pernicious nature of the act prohibited or its capacity or tendency to be harmful to the general public.

. Undertaking dance performances by ladies for a living, is not and cannot be said to be inherently pernicious or harmful to the general public. In fact

ladies undertaking dance performances for the entertainment of men, is part of the cultural tradition of Maharashtra e.g. Lavnis, Tamashas, etc. The performance of dances in places of public entertainment were expressly permitted/licensed under Section 33(1)(wa) of the Bombay Police Act and the Rules framed thereunder. Dance performances have been conducted by ladies in the prohibited establishments for the past twenty years. The Government of Maharashtra expressly permitted/licensed and even encouraged the establishment of such dance bars. The closing hours have been extended from 12.30 a.m. to 1.30 a.m. to 2.00 a.m. The Government in exercise of its appellate powers had granted performance licences even in 2005 when the amending Act came into force. The number of such licensed dance bars had increased from 24 in 1985-86 to 210 in 1995-96 to 2500 in 2005. 75,000 women, earned their livelihood by undertaking dance performances in such places of public entertainment. These women supported families, children and dependents. The petitioners members do not perform dance in the area demarcated and notified under the Bombay Prohibition Act. The direct and immediate effect of the impugned legislation would be to totally prohibit this lawful profession/calling of undertaking dance performances in places of public entertainment and thus deprive these women of their livelihood. Neither the Act nor its objects and

reasons nor the Government's affidavit indicates what changed in April, 2005 or why it was suddenly decided to totally prohibit dance performances which had been specifically permitted for the past twenty years. It is also submitted that the impugned legislation ex-facie does not indicate the exercise of intelligent care and deliberation and the reasons given by the State to impose the restriction/total prohibition are not supported by any material the State has placed on record.

. Similar arguments have been advanced on behalf of the petitioners in Writ Petition Lodging No.2338 of 2005 as also in Writ Petition No.2587 of 2005 and Criminal Writ Petition No.1971 of 2005 and Writ Petition No.6930 and 6931 of 2005.

55. On behalf of the State the learned Advocate-General submits that the Act is not violative of Article 19(1)(g) of the Constitution. In so far as bar owners are concerned, it is settled law that there is no fundamental right in them to carry on the business or sale of liquor. The sale of liquor is a privilege enjoyed by the Petitioners and hence any regulation of the said business as is done by the amending Act could never amount to a violation of fundamental right, the main activity of the sale of liquor itself, not being a fundamental right. Reliance is placed in **Khoday Distilleries Ltd. vs.**

**State of Karnataka (1995) 1 SCC 574**. Even otherwise their right to carry on trade is not prohibited at the highest they are restricted from carrying on a particular activity. It is therefore, not a prohibition, but at the highest a restriction on their right.

. Dealing with the violation of fundamental rights of the bar dancers, it is submitted that the overwhelming material evidence indicates that they have not adopted this profession out of choice, but have been forced or misled into the same by middlemen or other exploitative factors. The element of a free and informed choice of adoption of a profession is absent. If the activity is invariably harmful to the dancers and society and has its foundation in exploitation of women, to claim to continue the said activity as a fundamental right is inconsistent with the constitutional objectives and mission. The activity of bar dancers originates, exists and culminates in actions which are contrary to the constitutional mandate contained in Articles 19(2), 19(6), 23, 39(e) and 51A(e). Even a total prohibition of such activity ought not to be classified as a prohibition on a right to practice a profession. The prohibition is not total and if the dancer is skilled and a professional, she can dance at any other place as there is no fundamental right to practice a profession at a particular place.

Dancing can be a profession but not bar dancing. The restrictions imposed by the amending Act are reasonable. The reasonability of the restrictions is demonstrated by the fact that they fulfil the mandate of the Directive Principles and also the mandate of Article 23. As the Legislation is to implement the directive principles, it is per se reasonable. The expression in the interest of general public includes legislation, in the interest of public order, decency and morality. The restrictions imposed, satisfy the test of reasonableness. Even if it is assumed that bar dancing is a profession and the prohibition is total, the material on record justifies even a total prohibition on dance performance in bars and permit rooms and the experience of the past years shows that there is no other option. The recitals in the preamble and SOR cannot be disputed and the Court must take the same to be correct. The Court in order to consider the validity of the legislation is not circumscribed by the Preamble or the SOR and is entitled to look at all material placed before it. Every inference possible from the available material may be drawn so that as far as possible the legislative will is given effect to.

. On behalf of the Police Commissioner, it is reiterated that there is no fundamental right atleast in selling intoxicants like liquor. The bar owners at best have a statutory right. In so far as bar

dancers are concerned, it is submitted that the overwhelming number of dancers are illiterate, poverty stricken women of very tender age who are driven to dance in bars. There is no professional skill involved and hence they can seek employment elsewhere. There is no fundamental right to work in a particular establishment or place.

. On behalf of the Respondent No.4 in Criminal Writ Petition No.1971 of 2005, learned Counsel has submitted that the State action is to defend the weaker sections from social injustice and all forms of exploitation and to raise the standard of living of the people. It necessarily implies that economic activities,attired as trade or business or commerce, can be de-recognised as trade or business. At this point the legal culture and the public morals of a nation may merge, economic justice and taboo of traumatic trade may meet and jurisprudence may frown upon any dark and deadly dealings. This submission is based on the observations of the Apex Court in **Fatechand Himmatlal and Ors. vs. State of Maharashtra, AIR 1977 S.C.1825**. Permitting bar dancing amounts to sexual exploitation of women. In the instant case the House passed the Legislation unanimously. It is further assumed that individual Legislators took into consideration, all aspects based on their judgment and on their own study of the subject matter of the legislation, their

communications with their constituents and their own life experience and common sense. There was not even a single dissenting voice and considering that, the Court should accept the value judgment of the Legislators and as such this Court ought not to interfere. Reference is made to the observations of **Justice Cardozo in Steword Machine Co. vs. Davis, 301 U.S.548, 590 (1939)** where the learned Judge observed, that all laws in Western civilization are "guided by a robust common sense". There was material on record that the activity was detrimental to the society in many respects and in these circumstances it was open to the Legislature to act on the corollary assumption that performance in dance bars have tendency of being immoral and leading to anti-social behaviour. It was open to the Legislature to declare things or activities as being res extra commercium. Business activities in which there is dealing in alcohol, lotteries and gaming are res extra commercium. In the instant case the moral justification is accompanied by additional legitimate State interest in matters like safety, public health, crimes traceable to evils, material welfare, disruption of cultural pattern, fostering of prostitution, infiltration of crime, problems of daily life and the like. Considering the material before the Court, the legislative determination to disregard the activity or treat it as not deserving the status of business or trade should not be

faulted. It is then submitted that it was open for the Legislature to have prohibited activity of what has been argued as "Societal harms". The constitution, it is submitted, has made the principles of morality the touchstone for judging reasonableness of a statute and the expression public interest has always been construed as including, amongst others, principles of morality. It is submitted that this is not the case where this Court should entertain the question whether the Government's interest in morality alone would be sufficient to justify the legislative action when rights are claimed in respect of speech, expression and business. If the argument advanced on behalf of petitioner is accepted, then the State would not be in a position to impose prohibition or restriction on any of the freedoms contained in Article 19 and Article 19 would be a dead letter. It is contended that merely because the objects and reasons clause uses the word "illegal bars", cannot be construed to mean that legislation was intended to hit only the illegal bars and not the legal bars.

56. From the statistics based on the records produced by the State, it is seen that there are 345 establishments which have been given P.P.A. Licenses. In Mumbai there are 307 establishments having "Place of Public Amusement License". In Mumbai in 159 establishments having P.P.A. Licenses

there were altogether 4282 women working as dancers, singers and waitresses. The figures of cases registered for indecent behaviour and/or violation of licensing conditions, are as under:-

| Sections | Year 2001 | Year 2002 | Year 2003 | Year 2004 | Year 2005 | Year Total of 2000 | Bombay Police Act,1951 |
|---|---|---|---|---|---|---|---|
| 33(W) | 767 | 559 | 460 | 374 | 410 | 223 | 2793 |
| 110 | 4427 | 2998 | 2971 | 2810 | 2051 | 2146 | 17403 |
| Total | 5194 | 3557 | 3431 | 3184 | 2461 | 2369 | 20196 |

For offences under Section 110 of the Bombay Police Act, the maximum punishment is a fine of Rs.1,200/-. The record shows that there were about 5208 convictions. Offences registered under Section 294 I.P.C. between 2000 and upto 28.08.2005 involved 2995 females and 1957 males. The major arrests were in 2004, when 1591 females and 1380 males were arrested. Except for 11 minor girls taken in custody in 2004 there was no case of minor girls being arrested between 2000-2005. All cases are pending trial. There has been no conviction so far. Figures for cases regarding Immoral Trafficking (Prevention) Act 1986, shows that in 2000-2001 there were no cases registered. In 2002, 19 cases were registered, 313

males and 657 females were arrested of which 08 were minors. In 2003, 08 cases were registered, 120 males 191 females were arrested which included 16 minor girls. In 2004, 06 cases were registered and 81 males and 80 females arrested amongst whom were 07 minors. All cases are pending trial. The number of complaints of domestic violence due to dance bars between 2002-2005 were 19 in number. Between 2000 and 2005 only 11 PL licences were cancelled and 49 PPEL licences. 90 P.L. Licenses and 341 P.P.E.L. Llicenses were suspended and warning was issued to in the case of 14 P.L. Licences and 50 P.P.E.L. Licences. Whether Appeals were preferred and the outcome of the appeals are not disclosed. A list of 25 criminal cases registered during 2001 - 2005 associated with dance bars are pending trial. There is also a list of 21 cases registered between 2000 - 2005 which according to the Police are offences leading to breach of public order. Regarding the cases registered for offences amongst others, under Section 33(W) of the Bombay Police Act, a learned Judge of this Court Srikrishna J. (as his Lordship then was) in Girija T. Shetty Vs. Assistant Commissioner of Police, 1997 (1) All M.R. 256, had observed as under:-

> "The police raided the establishment on a particular day, picked up 53 different employees and charged them separately for the

same incident and clock up 56 separate offences. Unless statistics was being used for an oblique purpose I see no point in the manner in which the prosecutions were launched."

. Taking Mumbai, with a population of 14 million people as a case study, can it be said that this makes it a case of public order for the Mumbai District or the locality where the establishments are situated. The statistics indicate, that the presence of minor females is between 0.7% to 3.5% depending on the nature of offence. In offences registered under Section 110, it appears all the girls and customers were arrested. The conviction are not necessarily for obscenity but also for violation of the rule and terms of licenses. Registration of the cases individually as observed by Srikrishna J., (as his Lordship then was), is to inflate the number of cases. In a case under Section 294 of I.P.C.where the establishment had a license for cabarat dance, a Division Bench of this Court in **Narendra H. Khurana & Ors. vs. The Commissioner of Police and Another decided on** 18th December, 2003 whilst answering a reference being Criminal Application No.2773 of 2003 held, that to involve Section 294 of I.P.C, the essential ingredient was "annoyance to others" even if the act per se was indecent and obscene. The prosecution before the regular criminal courts would

indicate that there were no juveniles , as they could not be charged before regular criminal court.

57. Before considering the arguments on the factual matrix let us examine the effect of the amending Act. By the legislation what the Legislature has chosen to do is to ban dancing in any form in the prohibited establishments. The prohibited establishments are 'eating houses' having a permit room or beer bar which are described as places of public entertainment and also having a license for Public Performance. They fall within the expression place of public entertainment, as liquor is served for consumption in or near such place. It does not necessarily mean that liquor is being served in the 'eating house' as under the provisions of the Bombay Prohibition Act, liquor can only be served in a permit room which is a specific demarcated place as per the plan submitted and approved by the Authorities where liquor can be served. The activity of serving liquor itself is not banned, nor is other amusement banned. In the place of public entertainment, women are employed as dancers, singers as also as waitresses. There is no ban in women working as singers or waitresses or other jobs in the prohibited establishments. What is banned is the activity of dancing. Dancing in all eating houses, beer bars or permit rooms is not totally banned. It is permissible in the exempted establishments and

such other establishments which the State may notify for the purposes of tourism. The State, therefore, has not banned all dancing, in establishments serving liquor or beer which trade falls under the expression ‘res extra commercium’. The liquor or beer licences have not been cancelled.

58. The **Concept of Res Extra Commercium:** On behalf of the State learned Advocate General sought to contend that the activity of young girls/women being inducted as bar dancers is a de-humanizing process and trafficking them into bar dancing, completely lacks the element of conscious selection of a profession. A activity which has harmful effect on society cannot ever be classified as a profession or trade for protection under Article 19(1)(g) of the Constitution and such dances would be an activity which is "Res Extra Commercium." In answer on behalf of the petitioners it is submitted that dancing by itself or because dancing is performed by young girls cannot be inherently pernicious nor invariably or inherently pernicious. Merely because there may be some instance of prosecution of bar dancers and establishments having license where dances are performed by itself cannot result in the activity being declared as activity which is res extra commercium. In the earlier part of the judgment we have adverted to the fact that dancing as a form of art and expression has been known to our civilisation

from times immemorial. It is reflected in our cultural activities, carved out in stones and is a source of a large number of books. The dance and sculptures many a times are erotic or bordering on the erotic. Dance, therefore, by itself per se, cannot be said to be an activity which would be res extra commercium. The petitioners have produced voluminous documents, to show that dancing was common both to religious and secular activities. The petitioners point out that if we look at the dictionary meanings of the expressions in the Oxford Dictionary, they mean as under:-

"Pernicious" - means harmful or injurious;

"inevitable" means that which cannot be avoided, that sure to happen;

"inherent" means existing as a natural and permanent part;

"invariably" means never changing customs.

. Let us now understand as to how our Courts have understood the meaning of the expression 'Res Extra Communium'. In State of Bombay Vs. R.M.D.Chambarbaugwala (supra) the Court observed that activities which have been condemned in this country from ancient times appear to have been equally

discouraged and looked upon with disfavour in England, Scotland, the United States of America and in Australia. Dealing with the activity of gambling the Court observed that it would be difficult to accept the contention that those activities which encourage a spirit of reckless propensity for making easy gain by lot or chance, which led to the loss of the hard earned money of the undiscerning and improvident common man and thereby lowering his standard of living and driving him into a chronic state of indebtedness and eventually disrupt the peace and happiness of his humble home, could possibly have been intended by our Constitution-makers to be raised to the status of trade, commerce or intercourse and to be made the subject-matter of a fundamental right guaranteed by Article 19(1)(g). In Khoday Distilleries Ltd. (supra) the Apex Court held that trading in liquor would not amount to fundamental right, by holding that there is no fundamental right to trade or business in intoxicants. At the same time the Court did observe that though the citizen has undoubtedly a fundamental right to carry on business say in ghee he would not have any fundamental right to carry on business in adulterated ghee. Similarly, a citizen has no right to trafficking in women or in slaves or in counterfeit coins or to carry on business of exhibiting and publishing pornographic or obscene films and literature. This is so, because there are

certain activities which are inherently vicious and pernicious and are condemned by all civilised communities. Similarly, there are goods, articles and services which are obnoxious and injurious to the health, morals, safety and welfare of the general public. The matter again came up for consideration before the Constitution Bench in **State of Punjab and Anr. V. Devans Modern Breweries Ltd. & Anr. (2004) 11 SCC 26.** It may be mentioned that though the Constitution Bench held that there is no fundamental right to trade in liquor, that was a by majority opinion, with two learned Judges dissenting with the view of the majority. We may refer to the dissenting judgment of S.B. Sinha, J. The learned Judge observed that the dictionary or legal meaning of "res extra commercium" means those things which had been dedicated to the public, such as public roads, rivers, title of owners, etc. Commenting on the observations in the judgment as to how the Court had earlier come to the conclusion that trading in liquor is an activity res extra commercium, the learned Judge observed that for the purpose of determining the issue, the Courts were required to take into consideration, the history, the social perceptions vis-a-vis the State policy and other relevant factors before arriving at a decision that it is a necessary "social evil". From the above approach the test which may have to be applied is whether the activity condemned by civilised society.

An activity. therefore, to become res extra commercium as per the minority view, will have to be an activity which is condemned not by our national notions of morality or decency, but whether those notions are an accepted norm of civilised society amongst the nations of the World. We will however, have to proceed on the test applied in Khoday Distilleries Ltd. (supra). Dancing as we have noted earlier is one of the earliest form of human expression and recognised by the Apex Court as a fundamental right. If it is sought to be contended that a particular form of dance performed by a particular class of dancers is immoral or obscene that by itself cannot be a test to hold that the activity is res extra commercium. It can never be inherently pernicious or invariably or inevitably pernicious. If the notions of the State as to dancing are to be accepted, we would have reached a stage where skimpy dressing and belly gyrations which today is the Bollywood norm for dance, will have to be banned as inherently or invariably pernicious. We think as a nation we have outgrown that, considering our past approach to dancing, whether displayed as sculpture on monuments or in its real form. Dancing of any type if it becomes obscene or immoral, can be prohibited or restricted. Dancing however would continue to be a part of the fundamental right of expression, occupation or profession protected by our Constitution.

59. The submission on behalf of the Respondents to contend that the bar owners have no right to carry on the activity is that the main activity is that of sale of liquor in which there is no fundamental right, placing reliance on the judgment in Khoday Distilleries Ltd. (supra). The Apex Court in that case was dealing with legislation made by several States and the issue before the Apex Court was whether the Appellants/Petitioners before it had a fundamental right to carry on a trade or business in liquor. The law was summarised thus, by the Apex Court:-

> (1) The right to practise any profession or to carry on any occupation, trade or business does not extend to practising a profession or carrying on any occupation, trade or business which is inherently vicious and pernicious, and is condemned by all civilised societies. It does not entitle citizens to carry on trade or business in activities which are immoral and criminal and in articles or goods, which are obnoxious and injurious to health, safety and welfare of the general public, i.e. res extra commercium, (outside commerce). There cannot be business in crime.

(2) When the State permits trade or business in the potable liquor with or without limitation, if any, the State cannot make discrimination between the citizens who are qualified to carry on the trade or business.

(3) The State cannot prohibit trade or business in medicinal and toilet preparations containing liquor or alcohol. The State can, however, under Article 19(6) place reasonable restrictions on the right to trade or business in the same in the interest of general public.

The amending Act, as we have noted earlier, has prohibited a class of establishments which have permit room and beer bars from having the activity of dancing. The Legislature under Section 33B has exempted certain establishments having a permit room and beer bar where dancing is permitted. The argument based on Khoday Distilleries (Supra) perhaps could have been tested, if dancing was carried on in the permit room, beer bar. But even then, dancing, because it is being performed in a place where the State's privilege is permitted to be exercised, cannot cease to be a fundamental right, because there is no fundamental right to trade in liquor. Dancing in the instant case is not in the permit room or beer bar, but in a place of public entertainment which is

the eating house. As the Apex Court has recognised dancing as a 'fundamental right', dancing as we have held earlier cannot be brought under the expression 'Res Extra Commercium as it is an activity res commercium. However, it is open to the State to impose restriction or prohibition as long as it is reasonable and in the interest of the general public. The burden in a case where the State seeks to restrict or prohibit a fundamental right in an activity which is res commercium, is on the State. The State has to establish that the restriction is reasonable and in the interest of the general public. We may now advert to the judgment of the **State of Gujarat vs.Mirzapur Moti Kureshi Kassab Jamat & Ors., (2005) 8 SCC 534.** A Bench of seven Judges was constituted in view of the earlier Constitution Benches which had taken the view that there could not be total prohibition of slaughter of cattle progeny as held in **Mohd. Hanif Quareshi vs. State of Bihar, AIR 1958 S.C. 731** known as Qureshi-I and subsequent judgments. In that case, by the Bombay Animal Preservation (Gujarat Amendment) Act, 1994 a total prohibition was imposed on the slaughter of the progeny of the cow. The earlier Constitution Bench judgments had taken the view that a total ban on slaughter of she-buffaloes, bulls and bullocks after they ceased to be capable of yielding milk or of breeding or working as draught animals could not be supported as reasonable and in the interest of the

general public and as such the total prohibition on slaughter was struck down. The Court departing from the view in Quereshi-I, held that now there was enough scientific material placed before the Court which showed that cow and its progeny even after the purported age of sixteen are useful on account of dung and urine that they generate. At the same time in paragraph 79, the Apex Court observed as under:-

> "We hold that though it is permissible to place a total ban amounting to prohibition on any profession, occupation, trade or business subject to satisfying the test of being reasonable in the interest of the general public, yet, in the present case banning slaughter of cow progeny is not a prohibition but only a restriction."

This view was taken on the ground that the prohibition in so far as the activity of butchers (kasais) was not total, as the prohibition imposed was only on the slaughter of cow and her progeny and as such the ban was total only in regard to slaughter of one particular class of cattle. Cattle included buffalo whose slaughter was not banned. Apart from that the trade in hides, skins and other allied things could always be carried on and it was not necessary that animals must be slaughtered to avail those things. The animal, whose slaughter has been

prohibited, would die a natural death even otherwise and in that case their hides, skins and other parts of body would be available for trade and industrial activity based thereon. The Court further noted that the question whether a restriction amounts to a prohibition is a question of fact. Reliance was placed in the case of **Krishna Kumar Vs. Municipal Corporation of Bhatapara (2005) 8 SCC 612,** to hold that when prohibition is only with respect to the exercise of right referable only in a particular area of activity there was no total prohibition. By applying the test the Court took the view that only a part of the activity of the Kasai was prohibited and such prohibition was a restriction. We may here itself note that the right to impose a reasonable restriction includes the right to impose prohibition as held in **Narendra Kumar & Ors. vs. Union of India & Ors., AIR 1960 S.C.430)** was reiterated.

60. The activity of having dancing in an eating house was a part of the business of the bar owner. The business of the bar owners in so far as running the permit room or eating house has not been affected. There is also no prohibition on the bar owner having entertainment activities except dancing. It is still open to them to carry on that business. What is, prohibited is part of an activity of having dance performed in their establishments. Imposing a prohibition on a part of the activity is not total

prohibition but a restriction. The bar owners, therefore, cannot contend that Section 33A imposes a total ban or the same amounts to a total prohibition though the activity of dancing in those places of public entertainment is totally banned. We therefore proceed on the basis that it is a restriction and as such what has to be examined is, whether on the material produced by the State on record, the restriction is reasonable and in the interest of the General Public.

61. We have earlier noted the contention of the State, that there is no fundamental right to practice a profession at a particular place and it will be open to the person who is carrying on that profession to dance at any other place. We are dealing with an Act which in other place of public entertainment i.e. in the exempted establishments, permits dance activities. It is the contention of the State itself that the kind and type of the dancing which has been prohibited was to stop the exploitation of women and to prevent dances which are immoral and derogatory to woman. In other words the need to impose the restriction was on account of a particular type of dancing, which resulted in exploitation of women dancers as the dances performed were invariably immoral. In **Sodan Singh & Ors. vs. New Delhi Municipal Committee & Ors., (1989) 4 SCC 155** the issue involved was hawking in a public place. It is

in that context that the Apex Court held that the right to hawk is a fundamental right, yet the hawker could not contend that he has a right to choose a particular place or street for hawking. In **Fertilizer Corporation Kamagar Union (Regd.) Sindri & Ors. vs. Union of India and Ors., AIR 1981 SCC 344** the issue before the Apex Court was the right of the Union to be impleaded as a party in a case where the management wanted to sell the redundant and retired chemical plants and equipments on as is where is basis. In support of their contention it was argued that the sale without giving them a right to hear would affect their right to an occupation. It is in that context the Court held that the sale at the highest could affect their locum, but it does not affect their locus, to work as industrial workers.

. Before us are both the bar owners, who contend that the restriction is not reasonable and in public interest and the dancers who contend that prohibiting them to dance in those establishments amounts to a total prohibition and in the alternative a restriction which is not reasonable nor in public interest. If the bar owners themselves close down their establishments it would not have been open to the bar girls to contend that prohibiting them to dance in those establishments amounts to a total prohibition. The right of the bar girls to dance in the prohibited establishments is dependent on the bar

owners having a performance license. If that license is taken away, they cannot dance. In the instant case there is a total prohibition of dancing by a legislative act in the banned establishment. They are not prohibited from dancing elsewhere, though it may not be easy for them, as was observed by the Apex Court in Fertilizer Corporation Kamgar Union (supra). They are restricted from dancing in some establishments. It is, therefore, not a total prohibition, but a restriction. Therefore, to strike down the law the Court has to arrive at a conclusion, that the restriction is not reasonable and in the interest of the general public. We may at once note here that the State has contended that the bar dancers can dance elsewhere. It has been further contended that the dance performed in the dance bars requires no skill. Does that mean that in case of a musician versed in the use of a particular instrument or a musician conversant with a particular form of music, if the State imposes restriction on playing of a particular instrument or music, then is it an answer, that the said musician can play some other instrument or play some other form of music? Are our fundamental rights so fickle that a citizen has to dance to the State's tune? The State if it makes a law imposing a restriction on a fundamental right guaranteed under Article 19(1)(g), must satisfy the Court that the restriction is reasonable and in public interest. A law which prohibits or restricts

performance of dance, which forms a part of right to expression and as commercial exploitation, a part of trade or business or profession or occupation, is liable to be struck down unless the material on record would indicate that the restriction is reasonable and in the interest of the general public. This test flows from the requirement of protecting the fundamental rights of citizens so as not to denude them by arbitrary State action. The State in such cases must establish by scientific data in the form of material that the impact on the fundamental right of a section of citizens outweighed the impediment of rights of the general public. The S.O.R. of the amending Act provides an indication of the State intent. Firstly, the protection of morals which has to be tested considering the interest of the general public and secondly the protection of the the dancers themselves from exploitation or carrying on activities which are derogatory to the dignity of women.

62. The importance of S.O.R. : The Statement of objects and reasons clause appended to Bill No.LX of 2005 as introduced in the Maharashtra Legislative Assembly on 14th June, 2005 reads as under:-

> (1)The Commissioner of Police, District Magistrates or other officers, being Licensing Authorities under the Rules framed

in exercise of the powers of sub-section (1) of Section 33 of the Bombay Police Act, 1951 have granted licences for holding dance performance in the area under their respective charges in the State. The object of granting such performance licence is to hold such dance performance for public amusement. It is brought to the notice of the State Government that the eating houses or permit rooms or beer bars to whom licences to hold dance performance, have been granted are permitting the performance of dances in an indecent, obscene or vulgar manner. It has also been brought to the notice of the Government that such performance of dances are giving rise to exploitation of women. The Government has received several complaints regarding the manner of holding such dance performances. The Government considers that the performance of dances in eating houses, permit rooms or beer bars in an indecent manner is derogatory to the dignity of women and is likely to deprave, corrupt or injure the public morality or morals. The Government considers it expedient to prohibit the holding of such dance performances in eating houses or permit rooms or beer bars.

2. In the last Budget Session of the State Legislature, by way of a Calling Attention Motion, the attention of the Government was invited to mushroom growth of illegal dance bars and their ill-effects on the society in general including ruining of families. The members of the State Legislature, from ruling and opposition sides, pointed out that such dance bars are used as meeting points by criminals and pick-up joints of girls for indulging in immoral activities and demanded that such dance bars should, therefore, be closed down. These dance bars are attracting young girls desirous of earning easy money and thereby such girls are involved in immoral activities. Having considered the complaints received from general public including the peoples' representatives, the Government considers it expedient to prohibit the performance of dance, of any kind or type, in an eating house or permit room or beer bar, throughout the State by suitably amending the Bombay Police Act, 1951. However, a provision is also made to the effect that holding of a dance performance in a drama theatre or cinema theatre or auditorium; registered sports club or gymkhana; or three starred or above hotel; or in any other establishment or class of

establishments which the State Government may specify having regard to tourism policy for promotion of tourism in the State or cultural activities, are not barred but all such establishments shall be required to obtain performance licence in accordance with the said rules, for holding a dance performance."

. The use of Statement of Object and Reasons is permissible for understanding the background , antecedant state of affairs in relation to the statue and the evil which the statue has sought to remedy. The facts stated in the preamble and the S.O.R., appended to any legislation are evidence of the legislative judgment. They indicate the thought process of the elected representatives of the people and their cognizance of the prevalant state of affairs impelling them to enact the law. There are important factors which the Court will consider while testing the reasonableness of the restriction.

63. It is now well settled by a catena of decisions that it is permissible to look into the statement of objects and reasons of the Bill which actuated the step to provide a remedy for the then existing malady and the circumstances then prevailing. In **Shashikant Laxman Kale (supra)** the Apex Court observed thus:

"17.For determining the purpose or object of the legislation, it is permissible to look into the circumstances which prevailed at the time when the law was passed and which necessitated the passing of that law. For the limited purpose of appreciating the background and the antecedent factual matrix leading to the legislation, it is permissible to look into the Statement of Objects and Reasons of the Bill which actuated the step to provide a remedy for the then existing malady. In A. Thangal Kunju Musaliar v. M. Venkitachalam Potti, the Statement of Objects and Reasons was used for judging the reasonableness of a classification made in an enactment to see if it infringed or was contrary to the Constitution. In that decision for determining the question, even affidavit on behalf of the State of "the circumstances which prevailed at the time when the law there under consideration had been passed and which necessitated the passing of that law" was relied on. It was reiterated in State of West Bengal v. Union of India that the Statement of Objects and Reasons accompanying a Bill, when introduced in Parliament, can be used for the limited purpose of understanding the background and the antecedent state of affairs leading up to

the legislation. Similarly, the Pannalal Binjraj vs. Union of India, a challenge to the validity of clasification was repelled placing reliance on an affidavit filed on behalf of the Central Board of Revenue disclosing the true object of enacting the impugned provision in the Income Tax Act.

18. Not only this, to sustain the presumption of constitutionality, consideration may be had even to matters of common knowledge; the history of the times; and every conceivable state of facts existing at the time of legislation which can be assumed. Even though for the purpose of construing the meaning of the enacted provision, it is not permissible to use these aids, yet it is permissible to look into the historical facts and surrounding circumstances for ascertaining the evil sought to be remedied. The distinction between the purpose or object of the legislation and the legislative intention, indicated earlier, is significant in this exercise to emphasise the availability of larger material to the court for reliance when determining the purpose or object of the legislation as distinguished from the meaning of the enacted provision."

In **State of Gujarat vs. Mirzapur Moti Kureshi Kassab Jamat, (2005) 8 SCC 534**, a Seven Judges Bench of the Apex Court further observed as under:-

> "71. The facts stated in the preamble and the Statement of Objects and Reasons appended to any legislation are evidence of the legislative judgment. They indicate the thought process of the elected representatives of the people and their cognizance of the prevalent state of affairs, impelling them to enact the law. These, therefore, constitute important factors which amongst others will be taken into consideration by the Court in judging the reasonableness of any restriction imposed on the fundamental rights of the individuals. The Court would begin with a presumption of reasonability of the restriction, more so when the facts stated in the Statement of Objects and Reasons and the preamble are taken to be correct and they justify the enactment of law for the purpose sought to be achieved."

64. To understand the expression "reasonable restriction" we may consider various judgments where the expression came up for consideration. Firstly,

the judgment of the Apex Court in the case of **Municipal Corporation of City of Ahmedabad and Ors., vs. Jan Mohammed Usmanbhai & Another, AIR 1986 SC 1205.** The facts in that case were that standing orders issued by the Municipal Corporation of Ahmedabad Municipal Corporation directing the Slaughter Houses be closed on certain days. We really are not concerned with the facts there. The Apex Court on the issue involved, observed as under:-

> "Where the law providing for grant of a license or permit confers a discretion upon an administrative authority regulated by rules or principles, express or implied, and exercisable in consonance with the rules of natural justice, it will be presumed to impose a reasonable restriction. Where, however, power is entrusted to an administrative agency to grant or withhold a permit or licence in its uncontrolled discretion, the law ex facie infringes the fundamental right under Article 19(1)(g). Imposition of restriction on the exercise of a fundamental right may be in the form of a control or prohibition. But when the exercise of a fundamental right is prohibited, the burden of proving that a total ban on the exercise of the right alone may ensure the maintenance of the interest of

general public lies heavily upon the State. In this background of legal position the appellants have to establish that the restriction put on the fundamental right of the respondent to carry on their trade or business in beef was a reasonable one. The Court must in considering the validity of the impugned law imposing prohibition on the carrying on of a business or a profession attempt an evaluation of its direct and immediate impact upon the fundamental rights of the citizens affected thereby and the larger public interest sought to be ensured in the light of the object sought to be achieved, the necessity to restrict the citizen's freedom, the inherent pernicious nature of the act prohibited or its capacity or tendency to be harmful to the general public, the possibility of achieving the object imposing a less drastic restraint, and in the absence of exceptional situations such as the prevalence of a state of emergency, national or local, or the necessity to maintain necessary supplies or the necessity to stop activities inherently dangerous, the existence of a machinery to satisfy the administrative authority that a case for imposing restriction is made out or a less drastic restriction may ensure the object

intended to be achieved."

In considering whether the restriction imposed are reasonable and in the interest of general public, the Court referred to the law as set out in the **State of Madras vs. V.G. Rao AIR 1952 SC 196** and the test laid down as under:-

> "It is important in this context to bear in mind that the test of reasonableness, wherever prescribed, should be applied to each individual statute impugned, and no abstract standard, or general pattern of reasonableness can be laid down as applicable to all cases. The nature of the right alleged to have been infringed, the underlying purpose of the restrictions imposed, the extent and urgency of the evil sought to be remedied thereby, the disproportion of the imposition, the prevailing conditions at the time, should all enter into the judicial verdict."

The Court further observed that:-

> "Obviously it is left to the court in case of a dispute to determine the reasonableness of the restrictions imposed by the law. In determining that question the Court cannot

proceed on a general notion to what is reasonable in the abstract or even on a consideration of what is reasonable from the point of view of the person or persons on whom the restrictions are imposed. The right conferred by sub-clause (g) is express in general language and if there had been no qualifying provision like clause (6) the right so conferred would have been an absolute one. To the persons who have this right any restriction will be irksome and may well be regarded by them as unreasonable. But the question cannot be decided on that basis."

65. We may also gainfully refer as to the reasonability of the restrictions to the judgment of the Apex Court in **B.P. Sharma vs. Union of India & Ors., 2003 (6) SCALE, 498**. The Apex Court observed as under:-

"The main purpose of restricting the exercise of the right is to strike a balance between individual freedom and social control. The freedom, however, as guaranteed under Article 19(1)(g) is valuable and cannot be violated on grounds which are not established to be in public interest or just on the basis that it is permissible to do so. For placing a

complete prohibition on any professional activity, there must exist some strong reason for the same with a view to attain some legitimate object and in case of non-imposition of such prohibition it may result in jeopardizing or seriously affecting the interest of the people in general. If it is not so, it would not be a reasonable restriction if placed on exercise of the right guaranteed under Article 19(1)(g)."

. The expression reasonable restriction has been considered by the Apex Court in various judgments. The Apex Court in **M.R.F.Ltd. vs. Inspector, Kerala Government and Ors., 1998 (8) SCC 227**, has laid down certain tests on the basis of which the reasonableness of the restrictions imposed on the the exercise of right guaranteed under Article 19(1)(g) can be tested. The tests are as under:-

(1) While considering the reasonableness of the restrictions, the court has to keep in mind the Directive Principles of the State Policy.

(2) Restrictions must not be arbitrary or of an excessive nature so as to go beyond the requirement of the interest of the general public.

(3) In order to judge the reasonableness of the restrictions, no abstract or general pattern or fixed principles can be laid down so as to be of universal application and the same will vary from case to case as also with regard to changing conditions, values of human life, social philosophy of the Constitution, prevailing conditions and the surrounding circumstances.

(4) A just balance has to be struck between the restrictions imposed and the social control envisaged by clause (6) of Article 19.

(5) Prevailing social values as also social needs which are intended to be satisfied by restrictions have to be borne in mind.

(6) There must be a direct and proximate nexus or a reasonable connection between the restriction imposed and the object sought to be achieved. If there is a direct nexus between the restrictions and the object of the Act, then a strong presumption in favour of the constitutionality of the Act will naturally arise.

. We may add some more tests which the Apex Court had adverted to in **Papnasam Labour Union v. Madura Coats Ltd. & Anr., AIR 1995 SC 2200:-**

> (1) In appreciating such problems and felt need of the society the judicial approach must necessarily be dynamic, pragmatic and elastic.
>
> (2) The reasonableness has got to be tested both from the procedural and substantive aspects. It should not be bound by processual perniciousness or jurisprudence of remedies.
>
> (3) Restriction imposed on the fundamental right guaranteed under Article 19 of the Constitution must not be arbitrary, unbridled, uncancalised and excessive and also not unreasonably discriminatory. Exhypothesis, therefore, a restriction to be reasonable must also be consistent with Article 14 of the Constitution.

66. The next question is the meaning of the expression "restriction". We may at once refer to the judgment in **State of Gujarat vs. Mirzapur Moti Kureshi Kassam Jamat & Ors (supra)** where the Apex Court has held that three propositions are well

settled:-

(1) "restriction" includes cases of "prohibition";

(2) The standard for judging the reasonability of restrictions or restriction amounting to prohibition remains the same, excepting that a total prohibition must also satisfy the test that a lesser alternative would be inadequate;

(3) Whether a restriction in effect amounts to a total prohibition is a question of fact which shall have to be determined with regard to the facts and circumstances of each case, the ambit of the right and the effect of the restriction upon the exercise of that right.

. In **State of Maharashatra vs. Himmatbai Narendra Rao, AIR 1970 SC 1157**, the Apex Court had held that while striking a balance between rights of individuals and rights of citizenry as a whole, the financial loss caused to the individuals becomes insignificant, if it serves the larger public interest. As such in Sushila Saw Mills vs. State of Orissa, 2004 (1) SCC 712, the Apex Court held that the enactment imposing a total ban of saw mill business or sawing operations within reserved or

protected forest, was in public interest to which individual interest must yield. In **Krishna Kumar vs. Municipal Committee of Bhatapara, (2005) 8 SCC 612** the Apex Court held that when the prohibition is only with respect to the exercise of the right referable only to particular area of activity or relating to a particular matter there was no total prohibition. In that case the Constitution Bench was considering the case of adatiyas operating in a market area. A certain field of activity was taken away from them, but they were yet allowed to function as adatiyas. This was held to be amounting to a restriction. Applying these tests we have held on the facts that in the instant case the prohibition amounts to a restriction.

67. Before we discuss the issue further, let us examine the aspect of burden of proof. In **Saghir Ahmad & Anr. vs. State of U.P. & Ors., AIR 1954 SC 728** while acknowledging that there is a presumption in favour of the constitutionality of the Legislation, the Apex Court has observed as under:-

> "But when the enactment on the face of it is found to violate a fundamental right guaranteed under Article 19(1)(g) of the Constitution, it must be held to be invalid unless those who support the legislation can bring it within the purview of the exception

laid down in clause (6) of the article. If the respondents do not place any materials before the court to establish that the legislation comes within the permissible limits of clause (6), it is surely not for the appellants to prove negatively that the legislation was not reasonable and was not conducive to the welfare of the community."

. In **Channaiah (supra)** the Apex Court held that the Constitutional Court much watch and guard the rights guaranteed by the Constitution and in exercise of that right it has the power to set aside an Act of the legislature, if it is in violation of the freedom guaranteed by the Constitution. In **Sanjeev Coke Manufacturing Company (supra)** the Apex Corut held that once a statute leaves Parliament House, the Court's is the only authentic voice which may echo the intent of Parliament. This the Court will do with reference to the language of the statute and other permissible aids.

68. Dance performance of any kind or type is prohibited by the amending Act in the prohibited establishments. Dances, however, in the exempted establishments are permissible. From the affidavit of Waghmare, it is apparent that dances which are obscene and/or immoral are not permitted in the exempted establishments. This would mean the State

exercises control and can exercise control over performance under the existing law. In answer to the call attention motion on 30th March, 2005 the Honourable Home Minister had replied that the inspection is being carried out by the Licensing Authority through the respective Police Station. Such inspection is done from time to time. It was also announced that a Committee of Secretaries will be appointed under the Chairmanship of Additional Chief Secretary to examine whether the bars in Mumbai should be continued. It was also stated that licences at places other than Mumbai were being cancelled. The Statement of Objects and Reasons, clearly sets out that it is the indecent, obscene dances performed in a vulgar manner in the the eating houses which are prohibited. The eating house itself is not denied a performance license. The license provides for entertainment except dancing, as in the opinion of the State the dances performed were derogatory to the dignity of women and are likely to deprave, corrupt or injure public morality or morals. The S.O.R. refers to the calling attention motion. The call attention motion was to draw the attention of the Legislature to the mushroom growth of illegal dance bars. While replying, the Honourable Minister stated that performance in many of those places were without having a performance licence. A statement was also made that in Mumbai, it was possible to control the activities, whereas it was not possible

in the rural areas on account of inadequacy of police force. The S.O.R. sets out the complaints by members of the public as also members of the Legislature, that these places are being used as meeting points by criminals, pick-up joints for girls, and such bars are attracting young girls desirous of earning easy money and are encouraged to indulge in immoral activities and as such there was a demand for closure of such establishments. In so far as the letter from the Chairperson of the State Commission on Women there is nothing on record that the Commission conducted any enquiry or survey or the like to arrive at the conclusion that dancing in the banned establishments should be prohibited before writing the letter. It would also be apparent from the S.O.R. that the entire object or prohibiting the dances in the establishments was on account of what is aforestated. There is no prohibition for women working in such establishments other than dancing. What this means is that the State accepts that girls can work in the dance bars but not as dancers. In fact the Honourable Minister while answering questions pertaining to the calling attention motion, was aware of the fact, that if women waitresses are banned, there could be question pertaining to women's rights. The women who were earlier working as dancers can be employed in those very establishments in any other capacity including as waitresses. They can sing, serve as waitresses and other incidental

jobs. Reference is made to the Preamble and S.O.R. as the learned Advocate General has relied upon it to support the restriction. It is, therefore, not the presence of women in the establishments which has led to the prohibition, but because of the type of dance performed in the prohibited establishments which the Legislature was of the opinion, was indecent, obscene and vulgar, resulting in exploitation of women and derogatory to their dignity and likely to deprave, corrupt or injure the public morality or morals. There is no prohibition imposed on the running of permit room or beer bar. Those who patronise the establishments can still be served liquor or beer in the permit room or beer bar by women. The girls serving as waitresses have access to the patrons and also sit with them as set out in the Chapekar, SNDT and Prayas reports. No survey or any report was prepared or commissioned by the State Government, before the Cabinet took the decision to introduce the ban. The State, therefore, does not find it offensive to the morals or dignity of women and/or their presence in the place of public entertainment being derogatory, as long as they do not dance. They can serve liquor or beer to their customers. The State's case for prohibiting dances in dance bars is, that it is dancing which arouses the physical lust amongst the customers present. There is no arousing of lust when women serve the customers in the eating house, but that happens only when the women start

dancing. The trade or business of having an eating house or a permit room or a licence for public amusement to have a dance performance are independent activities by themselves. The right to dance has been recognised by the Apex Court as part of the fundamental right of speech and expression. If that be so, it will be open to a citizen to commercially benefit from the exercise of the fundamental right. This commercial benefit could be by a bar owner having dance performance or by the dancers themselves using their creative talent to carry on an occupation or profession. In other words using their skills to make a living. The amendment, prohibits the bar owners from carrying on any business or trade associated with dancing in these establishments and the bar girls from dancing in those premises.

69. Has the State Government discharged its burden, by placing material, scientific or otherwise, before the Court which was available at the time the Legislation was enacted, or even thereafter, which can include the history of the times, the antecedent state of affairs and the like.

. In order to support their contention that the restriction is reasonable the learned Advocate General has principally relied on the experience of the Legislature as reflected in the deliberations in the house, the unanimous passing of the bill, the

calling attention motion and the reply to it, the Statement of Objects and Reasons and the preamble to the Act. The complaints received by the State Government and other material which has been documented in two volumes. The report of Subhada Chaukar published in 1998, report of Prayas as also SNDT University. The material in the two volumes, includes the prosecutions launched in respect of incidents in the prohibited establishments for offences of obscenity and breach of rules as also other offences. Legislation, it is also set out is to give effect to directive principles as contained in Article 39(e) and the fundamental duties as set out in Article 51A(e) as also International Covenants. This has also been canvased on behalf of the Commissioner of Police and the Home Minister.

. The Petitioners have principally relied on the report prepared by the SNDT University. The petitioners have also relied upon the Government Resolution dated 10th December, 2002 by which a Committee was formed to suggest measures, to amend the Rules for exercising control on hotel establishments presenting dancing programmes and to take remedial measures to check other undesirable practises being indulged in hotel establishments which include prevention of prostitution in hotel establishments and to take remedial measures to see that criminals are not sheltered in hotel

establishments and to frame a code specifying what type of dance forms should be presented in hotel establishments and creating a Roving Squad to check undesirable practices in hotel establishments. One of the members was Ravipalsingh Gandhi, the Chairman of AHAR, besides public officials. It was Chaired by the Principal Secretary ( E. I), Home Department and several Senior Police Officials. The Committee prepared its report and it was submitted to the State Government. Based on the recommendations the State Government wrote to all District Judicial Magistrates and Police Commissioners by their communication dated 16th July, 2004 to amend the Rules for exercising control on Hotel Establishments presenting dance programmes. The recommendations were as under:-

(1) Bar girls dancing in dance bars should not wear clothes which expose the body and also there should be restriction on such dancers wearing tight and provocative clothes.

(2) There should be a railing of 3 ft. height adjacent to the dance stage. There should be distance of 5 ft. between the railing and seats for the customers. In respect of dance bars who have secured licences earlier, provisions mentioned above be made binding. It should be made binding on dance bars seeking new licences to have railing of 3 ft. height adjacent to the stage and leaving a distance

of 5 ft. between the railing and sitting arrangement for customers.

(3) Area of the dance floor should be minimum 10 x 12 ft. i.e. 120 sq.ft. and the area to be provided for such dancer should be minimum 15 sq. ft. so that more than 8 dancers cannot dance simultaneously on the stage having area of 120 sq.ft.

(4) If the dancers are to be awarded, there should be a ban on going near them or on showering money on them. Instead it should be made binding to collect the said money in the name of manager of the concerned dancer or to hand over to the manager.

(5) Apart from the above, a register should be maintained in the dance bar to take entries of names of the girls dancing in the bar every day. Similarly, holders of the establishment should gather information such as name, address, photograph and citizenship and other necessary information of the dance girls. Holder of the establishment should be made responsible to verify the information furnished by the dance girls. Also above conditions should be incorporated in the licences being granted."

Dealing with the material produced by the State in the form of the two volumes, have contended that the material would not support the case that the

restriction is reasonable. It is also pointed out that the argument in trafficking is not disclosed by the S.O.R. or the preamble, but is sought to be raised for the first time by affidavits filed in the Court. The material, it is submitted, must be scientifically collected data and the writ Court has to be very careful in deciding what data should be accepted and relied upon. **See Hashamutulla vs. State of M.P. (1996) 4 SCC 391.**

70. As late as on 16th July, 2004 the State Government was of the opinion that recommendations given by the Committee could be implemented by making rules and were sufficient to prevent the undesirable practise going on in hotel establishments which were having an adverse effect on the society. Though these recommendations were forwarded to all the competent authorities who had to enact the Rules, none of the Licensing Authorities did in fact frame and notify the make Rules. On 30th March, 2005 the State Government in answer to a call attention motion did not find it necessary to prohibit dancing in dance bars in Mumbai. A statement was made that a Committee of Secretaries would be appointed to look into the issue. It was never appointed. Therefore, the onus on the State is far greater to establish the reasonableness of the restrictions considering that in July, 2004 it was of the opinion that imposing restrictions by way of Rules on performance of dances

in the prohibited establishments was a sufficient remedial measure to check other undesirable practice being indulged in the hotel establishments and in March, 2005 the Home Minister made a statement in answer to the call attention motion against mushrooming of illegal bars, that there was sufficient police machinery in Mumbai to control dance bars, but dance bars in rural Maharashtra would be banned on account of insufficient police force. From the statement of the Home Minister it is clear that the main issue was of enforcing the laws in force. All the material now relied upon except the Prayas and SNDT reports was available. The directive principles and fundamental duties stand as they stood when the directions were issued to implement the recommendations as also when the amending Act was introduced. The position of International covenants is similar. The complaints before the Government were the same namely that in the prohibited establishments, prostitution rackets were being run and they served as pick up joints and that dances are horrid and obscene in nature and that criminals are being sheltered in such places. The Legislature, no doubt, cannot be restricted from enacting a Legislation even if the Government or its delegates under the Act were at one point of time of the opinion that the remedial measures would suffice to check the undesirable practices. That is within the exclusive domain of the Legislature. Yet considering

Article 19(6) and as the act involves deprivation of a fundamental right, the restriction must be established to be reasonable and in the interest of the general public.

71. The reasonableness of the restriction has to be established by an evaluation as to direct and immediate impact of the restraint/legislation, on the fundamental rights of the citizens affected thereby and the inherently pernicious nature of the act prohibited or its capacity or tendency to be harmful to the general public. The restrictions have a direct impact on the livelihood of those working as bar dancers in the prohibited establishments apart from the bar owners right to carry on a trade or occupation or profession. The right to earn a livelihood apart from other rights, also flows from the fundamental right to undertake a calling or profession. According to the petitioners there were about 75,000 women who were earning their livelihood by undertaking dance performances, who supported families including children and dependents. These figures are not really supported by any established material except for bare statements. According to the State itself in Mumbai alone, there are 1667 establishments having permit rooms and restaurants and 115 beer bars and restaurants. Out of these 307 had license for place of public amusement where dances could be legally performed. It is, however,

possible to accept that the a substantial number of women were employed in the dance bars considering the membership claimed by Bharatiya Bar Girls Union and the figures produced by the State that in 154 establishments having P.P.A. license, their records show that 3248 dancers, 75 singers and 959 lady waitresses, totaling 4282 women were working and the material in the Chapekar Report, SNDT University report and report of Prayas. Undertaking a dance performance for a living by ladies by itself cannot be held to be inherently pernicious or harmful to the general public. Such dance performances are permitted in the exempted establishments as also in Tamashas and Sangeet bari - see SNDT Report. In fact the petitioners contend that ladies undertaking dance performance for the entertainment of men is part of the cultural tradition of Maharashtra and illustrations are given of Lavani, Tamashas, etc., which are not banned. In twenty years of existence of the dance bars their numbers have increased from about 24 to present 345 the figure given by the State Government. The closing hours which were earlier 12.30 a.m. have been increased over the years from 12.30 a.m. to 1.30 a.m. and from 1.30 a.m. to 2.00 a.m. Apart from the Committee which was appointed by the State to remedy the derogatory practices in the establishments in July, 2004 the Government has not undertaken any further study or survey of the dance bars.

72. Let us now examine the contentions urged by the State in support of the restrictions with the material on record. They can be summarised as under:-

. Dance performances were invariably conducted at all prohibited establishments in an indecent, obscene and vulgar manner. The basis for this was that the music was loud and sensuous; young girls were employed to attract customers; dancers would wear dresses which were apparently for names sake traditional, but which were truly revealing; dance steps were most vulgar and of a manner unknown to any known or established dance form and done with the sole objective of arousing lust; the dance was merely wild gyrations to the tune of Hindi film songs in the presence of men and not traditional dance forms of Bharatnatyam, Kuchipudi, Kathak; the dance performances were neither entertainment nor art; the dancers body movements was done so as to attract certain customers; the dancer would make eye contact with certain customers to entice them; the dancers would deliberately dance in such a manner so as to lure passion of the customer in a derogatory manner in order to solicit cash rewards and the dance performances were nothing but exploitation of women; Indian culture does not approve of this kind of business, which treat women as a commodity. Dance

performances were being conducted in violation of the Rules and the licence conditions and there is no fundamental right to organise such obscene dance performances.

73. In M/s.Fatechand Himmatlal & Ors. (supra) the Apex had observed that "realism in the Legislature is a component of reasonableness."

. On behalf of the petitioners in Writ Petition No. 2052 of 2005 and other petitions it has been submitted that the reasonableness of the restrictions is required to be established by an evaluation as to:-

1. The direct and immediate impact of the restraint/legislation on the fundamental rights of the citizens affected thereby.

2. Inherently pernicious nature of the Act or its capacity or its tendency harmful to the general public.

It is submitted that number of bar dancers has increased from 23 in 1985-86 to 210 in 1995-96 to 2500 in 2005 and 75,000 women earn their livelihood by undertaking dance performance, who support their family, children and dependents. The dance performed

by ladies for living cannot be said to be inherently pernicious or harmful to the general public as evidenced by the cultural traditions of Maharashtra like Lavnis, Tamashas, etc.. The right to perform dance for living does not emanate from the Bombay Police Act. This right flows from the fundamental right of such dancers/ladies to undertake their calling or profession. These rights have been sought to be regulated by the Bombay Police Act and the Rules framed thereunder. The State of Maharashtra has licenced places of public entertainment for the past 20 years where dance performances have been conducted by ladies and had extended closing hours from 12.30 to 1.30 to 2.00 a.m. and in exercise of the Appellate Powers have issued licences till 2005.

71. The learned Counsel contend, that the State seeks to justify the ban/total prohibition of conducting dance performance of any kind or type by asserting that:-

(a) dance performances were invariably conducted at all such establishments in an indecent, obscene and vulgar manner.

(b) dance performances would be conducted at such dance bars beyond the prescribed time;

(c) dance bars had become pick up joints for

prostitution by bar girls.

(d) the manner of conducting dance bars constituted a threat to public order.

(e) the State Government had concluded that it was not possible to deal with the situation within the framework of the existing laws.

(f) It is submitted to the contention that dance performances were invariably conducted indecent, obscene and vulgar manner that no material has been placed on record that dance performances of all the 2500 dance bars were being conducted in an indecent, obscene and vulgar manner or that this was in the large number of bars. Dances have been conducted in the same manner for the past two decades. Though there are rules in force which permit suspension or canceling the licence no performance licences have been suspended or cancelled. This belies the contention of the State. It is then submitted that merely because dance bars are conducted beyond the prescribed time by itself does not warrant a total prohibition on conducting any type or kind of performance in the dance bars. In answer to the contention that dance bars have

become pick up joints for prostitution by bar girls, it is submitted that all the 34 cases registered under PITA from 2000 to 2005 there were only 15 victim involved and that too only in one year 2004. The material would show that there is a steep decline in the cases registered after 2002. There have been 19 in 2002, 8 in 2003, 6in 2004 and only 1 in 2005 and 5 to 10 cases registered under PITA as against 2500 bars would clearly demonstrate that there is no widespread prostitution related to dance bars. The SRO would indicate that the concern voiced by the Legislators was in relation to illegal dance bars being used as pick up joints. To the submission that conducting dance bars constituted a threat to public order, it is submitted that none of the aspects as contended on behalf of the petitioners bar girls relate to public order. It is pointed out that the figure submitted on behalf of the State that 2793 cases have been registered against dance bars from 2000 to 2005 is misleading. Similarly the reference to 17,403 cases registered under Section 110 is also misleading. Section 110 is a summary action for disorderly or indecent behaviour and can only result in imposition of a fine not exceeding Rs.100/-. It is pointed out

that judgment of this Court Girija Tamappa Shetty vs. The Assistant Commissioner of Police, Wagle Estate Division, Dist. Thane & Ors., 1997 (1) All M.R. 256 would demonstrate that the State inflates the figures. In that 56 prosecutions were lodged. Pursuant to raid of the establishments on a particular day 56 employees were charged separately under same sections for the same incident. The Court observed that in order to consider the offence is registered against establishment is nothing but a farce. In so far as the contention of the State that it was not possible to deal with the situation within the framework under the prevailing laws by itself is no answer. The prohibition imposed would require exceptional situations such as the prevalence of a state of emergency-national or local or that the necessity to maintain essential supplies, or the necessity to stop activities inherently dangerous, the existence of a machinery to satisfy the administrative authority that no case for imposing the restriction is made out or that a less drastic restriction may ensure the object intended to be achieved.

74. The learned Advocate General in his

submissions in support of the restriction relies on the following material:-

a. The experience of the Legislature as reflected in the debates in the house, the Calling Attention Motion and the reply;

b. The two volumes of documents produced by the State;

c. The three reports of Prayas, SNDT and Shubhada Chaukar;

d. The two affidavits of Shri Waghmare respectively dated 1st October,, 2005 and 1st December, 2005;

e. The Preamble and the Statement of Objects and Reasons (SOR) of the amending Act of 2005 and the directive principles and fundamental duties;

f. Admissions made by Ms. Varsha Kale as relied upon by Shri R.R. Patil in his affidavit.

. It is submitted that the aforesaid material is sufficient to show that the prohibition of the activities contemplated by the amending Act fulfils

the constitutional mandate of Articles 23, 37, 39(e) and 51A(e) of the Constitution of India and is essential in the interest of the general public and is eminently necessary and reasonable.

75. We may, therefore, consider first the system of licensing which was prevalent before issuing the licence. Three different licenses had to be obtained from three different authorities:-

(i) The Mumbai Municipal Corporation for selling and serving food;

(ii) From the Commissioner of Police for Premises, Performance and Entertainment Licences; and

(iii) From the Collector under the Bombay Prohibition Act, 1949 read with the Bombay Foreign Liquor Rules, 1953 for selling liquor.

. In so far as serving of liquor is concerned, we have noted in the earlier part of the judgment that it can only be served in a permit room.

. Section 33(1)(w)(i) of the Bombay Police Act, 1951 confers powers to make rules for licensing or control in the interest of public order, decency or

morality or in the interest of the general public with such exceptions as may be specified, the musical, dancing, mimetic or the article or other performances for the public amusement, including meals and tamashas which are the same tests for considering the reasonableness of the restrictions under Article 19(6).

. Rules 122 and 132 of the Amusement Rules, 1960, in so far as the holder of the performance licence does not permit committing on the stage or any part of the auditorium, any profanity or impropriety of language, any indecency or dress, dance, movement or gesture. Under Rule 123 prohibits persons other than the holder of a performance licence staging on stage or in any part of the auditorium itself any profanity or impropriety of language, any indecency of dress, dance, movement or gesture.

. Some of the Licence conditions of Performance License amongst others are:-

(i) any exhibition or advertisement whether by way of posters or in the newspapers, photographs or nude or scantily dressed women;

(ii) any mixing of the cabaret performers

with the audience or any physical contact by touch or otherwise with any member of the public;

(iii) any act specifically prohibited by the Rules;

76. We have earlier reproduced the preamble and the Statement of Objects and Reasons. From the preamble and SOR the following emerges:-

1. That licensed premises are permitting the performance of dances in an indecent, obscene or vulgar manner.

2. Such performance of dances lead to exploitation of women.

3. Performance of dances in the eating houses, permit rooms or beer bars in indecent manner are derogatory to the dignity of women and are likely to deprave, corrupt or injure public morality and morals .

4. In the last Budget Session of the Legislature a Call Attention Motion had been tabled drawing the attention of the Government to mushroom growth of illegal bars

and their effect on the society in general including ruining of families. The members of the State Legislature both Ruling and Opposition side had pointed out that such dance bars are used as meeting points by criminals and pick up girls for immoral activities and they have demanded that such dance bars,therefore, should be closed down. The dance bars were attracting young girls desirous of earning easy money and thereby such girls are involved in immoral activities. The Government having considered the complaints received from general public including People's Representatives considering the performance of dance in mind in eating houses,permit rooms or beer bars throughout the State.

The following calling attention motion was tabled on 30th March, 2005 by Shri Vivek Patil (Panvel):-

"The action to be taken by the Government, measures and Government's view on the damages caused to the number of families due to 42 bars, started from last few months in the Raigad District at Panvel, Khanda Colony, Kon, Bhingari, New Panvel, Khalapur, Pen, etc. destruction of the Indian Culture due

to the bar culture, adverse effects on the students due to the bars which are in the vicinity of the Schools, the vices spreading in the lives of the young in the rural area due to the impact of the bar culture, a vigorous agitation conducted by Women Wing of Shetkari Kamgar Party against the same on 5th May, 2004 and Rasta Roko Agitation, the representation given by them to the District Superintendent of Police Shri Dnyaneshwar Fadtare with a demand that all the ladies bars in the District shall be closed within 15 days and demand for cancellation of licences given to the said bars under the guise of cultural programmes, instead of closing down the said ladies bars, the gradual increase of immoral activities, a raid by the Local Crime Investigation Branch on a ladies bar by name "Bay Watch" near Khalapur Highway on 10-11-2004, the arrest of 34 bar girls and 52 other people therein, the urgent action taken or to be taken by the Government regarding the same, measure and reaction of the State."

. The reply was tabled in the House by Shri R.R.Patil, Home Minister. In reply to the Calling Attention Motion the following question was raised:-

"Whether the Government is going to amend the statute? and would take the decision of closing down the dance bars, if necessary, instead of cancelling the licenses and imposing minor inactions?

In answer the Home Minister replied to the House as under;-

".....The Government is fully in agreement with the view that the young generation is being cultural harmed. A committee of the Secretaries will be appointed under the Chairmanship of Additional Chief Secretary to examine whether the Bars which are therein Mumbai from last many years, are to be continued or not and examine the factors of legal licences and permissions therein. In Rural area, the said culture is now increasing, the same should be stopped before it further increases. The license granted at places other than Mumbai will be cancelled as early as possible. No new licences would be granted. The places where such Bars are being run illegally, after obtaining only eating and liquor licenses, in such cases the eating and liquor licenses will be cancelled and all the necessary amendments in the Rules will be made. The Government may bear losses

to the tune of few crore but in no circumstances, will allow the new generation to be destroyed, the damage of the young generation shall not be tolerated. After expressing a complete agreement with the views of the Hon'ble Members, the concerned Rules will be amended at the earliest and the steps will be taken to close all the bars at the other places except Mumbai at the earliest and the decision will be taken as per the report submitted by the committee, by appointing the said committee under the Chairmanship of Additional Chief Secretary."

. In so far as prohibiting lady waitresses the Honourable Minister was pleased to state:-

"Hon'ble Speaker, the possibility of needy ladies amongst the lady-waiters also cannot be ruled out. If the lady-waiters are banned,then in that case, there is a possibility of questions pertaining to the Women Rights arising. Therefore, the suggestion made by the Hon'ble Member will be examined.

This was in answer to a question raised by Vinayak Nimhan. We have referred to this material, as it has been placed before us by the Respondents. Its

authenticity has not been disputed.

77. The petitioners in Writ Petition No.2450 of 2005 have placed material furnished to Shri Manjit Singh Sethi, who is the petitioner in Criminal Writ Petition NO.1791 of 2005 under the Maharashtra Right to Information Act, 2002. From that the following facts emerged:-

(i) The announcement regarding closure of dance bars was made by the Minister of Home, State of Maharashtra in the Legislative Assembly on 30th March, 2005 at 2.00 p.m.

(ii)The subject regarding closure of dance bars was discussed in the meeting of the Council of Ministers of Maharashatra Government on 11th April, 2005 and 18th May, 2005.

(iii) The petitioners specifically asked for the copies of the reports done at the instance of the Government or research done by the N.G.Os. or Governmental Agency showing that amusement performance in eating houses, permit rooms and beer bars in Maharashtara purportedly led to violation of dignity of women or depravation, corruption and injury of public morals. The reply given

by the Government was that no investigation of such kind was done by the Government of Maharashtra or non-Governmental organisation."

78. The material produced in two Volumes by the State Government may be summarised as under:-

(1) Complaints received for closure/being undesirable.

(2) Complaints from Social/Women organisations.

(3) Arrest of minor girls from the dance bars under PITA.

(4) Cases of assaulting numbering 23 between 2000 and 2005.

(5) Reports from various Police Stations in the Bombay Region.

79. We may now consider the three reports relied upon. The first such report is by one Subhada Chaukar under the Caption "Premises of Mumbai Bar Girls" of June 1st 1998. It is a one person report. It appears that 50 bar girls were interviewed. The figures of bar girls are reported by her are 1,00,000

to 1,25,000 and the number of such establishments are 100 to 1200. According to the report the women served in the establishments because of:-

(1) Attraction of big money and need to shoulder responsibility of looking after the family.

(2) Misery or ill-treatment at home.

(3) No good husband.

(4) Glamour of the job.

(5) Not fit for marriage.

(6) Out of 50 representative girls 12 lived with their husbands, 7 were widows and 11 were unmarried.

The report also discloses that tips given are deposited in a box and at closing time are divided between the dancer and the owner.

. There are two other reports both carried out, after announcement of the ban on dances. The State has relied upon the report prepared by Prayas, a Field Action Project of the Tata Institute of Social Science, Mumbai. They interviewed 72 persons. The

Report on the women shows that before coming to work in the dance bars, 96% of the women either in their village or in their present place of residence were doing some work like farming, zari work, domestic work, rolling beedies, etc. 90% had family responsibilities. The report sets out it becomes clear from the above scenario that elements of human trafficking are present in the process of entry into this sector and it fits into the definition of human trafficking as per the UN protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, supplementing the UN Convention Against Transnational Organised Crime, 2000. Of the women interviewed the kind of work being done as as follows:-

Dancers 57%

Waiters 26%

No information available 7%

87% were between 18 to 30 years and 6% were less than 18 years. In so far as educational status was concerned 50% were illiterate, 13% had studied upto primary level and 17% had studied between 5th to 10th standard. The marital family status was as under:-

Married : 68%

Unmarried : 21%

Information not available : 11%

47% of the married women were deserted, divorced, separated or widowed. The report states about their the physical and mental health, as well as increase in their sexual exploitation and that the women did not find any dignity in their work. 33% women were in fact supporters of the decision to close down the dance bars even though their livelihood presently dependent on that option.

80. The petitioners have relied upon the study conducted by Research Centre for Women Studies, SNDT Women's University, "Working Women in Mumbai Bars, Truths behind the Controversy, under the Heading "MITH-1". The report sets out that they interviewed 500 women engaged by the dance bars.. About 12.40% hail from Mumbai and 5% from the rest of Maharashtra. Others are from rest of the country. In so far as the age of the dancers, according to the report those less than 14 years accounted for 0.20.%. Those between 14 to 18 constituted 6.60%. Those between 19 to 30 constituted 88.20%. Those who started work in the dance bars 39.80% started between 16 to 18 years. 20.80% between 19-20 years and 18.60% between 21 to 25 years. Those who started between 14-15 were

10.80%. Those who had started other work i.e. not in the dance bars at the age less than 14 were 31.62%, 14 to 15 were 13.68%, 16 to 18 were 28.21%. In other words those who started working earlier other than in dance bars between 14 and 18 years accounted for nearly 80%. The earning figures were then set out which indicate that average earning per month of 42.80% was less than Rs.10,000/-, 27.20% between Rs.10,000/- to Rs.15,000/- and about 25.80 earned between Rs.15,000/- to Rs.30,000/-. About 72.80% were shown as the only earner in their family. In so far as education is concerned, the figure show 42% as illiterate and about 41% having studied from 1st to 8th Standards. The conclusion arrived is that the ban was imposed in haste. More indepth studies were required and it is recommended that dance bars should not be banned and there should be Regulation for working conditions of dance bar women. The figures given by the office of the Police Commissioner of various offences recorded have been set out earlier.

81. The relevant provisions of the Bombay Police Act 1951 and the rules made which empower the Licensing Authority to frame Rules are reproduced below:-

Section 33(1)(w):

(i) licensing or controlling places of public amusement or entertainment;

(ii) prohibiting the keeping of places of public amusement or entertainment or assembly, in order to prevent obstruction, inconvenience, annoyance, risk, danger or damage to the residents or passengers in the vicinity;

(iii) regulating the means of entrance and exit at places of public amusement or entertainment or assembly, and providing for the maintenance of public safety and the prevention of disturbance thereat;

Section 33(1)(wa):

(i) licensing or controlling [in the interest of public order, decency or morality or in the interest of the general public], with such exceptions as may be specified, the musical, dancing, mimetic or the article or other performances for the public amusement, including melas and tamashas;

(ii) a regulating in the interest of public order, decency or morality or in the interest or the general public, the employment of

artistes and the conduct of the artistes and the audience at such performances;

(iii) prior scrutiny of such performances [and of the scripts in respect thereof if any, and granting of suitability certificate therefore subject to conditions if any [by a Board appointed by the State Government for the purpose, either for the whole State or for the area concerned] [the members of the Board being persons who in the opinion of the State Government possess knowledge of, or experience in, literature, the theatre and other matters relevant to such scrutiny] or by an Advisory Committee appointed by the Commissioner, or the District Magistrate in this behalf; [provision for appeal against the order or decision of the Board to the prescribed authority, its appointment or constitution, its procedure and other matters ancillary thereto, and the fees (whether in the form of court fee stamp or otherwise) to be charged for the scrutiny of such performances or scripts for applications for obtaining such certificates and for issuing duplicates thereof and in respect of such appeals;]

(iv) regulating the hours during which and

the places at which such performances may be given."

From the above provisions it is crystal clear that the Commissioner of Police can frame Rules for not only licensing and controlling places of public amusement and entertainment but also for taking necessary steps to prevent inconvenience etc. to residents or passers-by or for maintaining public safety and for taking necessary steps in the interest of public order, decency and morality.

. Furthermore, there are Rules known as "The Rules for Licensing and Controlling Places of Public Amusement (Other than cinema) and Performance for Public Amusement including Melas and Tamasha, 1960." Rules 122 and 123 of the said Amusement Rules, 1960 prescribe conditions for having performances.

"122. Acts prohibited by the holder of a Performance Licence: No person holding a Performance Licence under these Rules shall, in the beginning, during any interval or at the end of any performance, or during the course of any performance, exhibition, production, display or staging, permit or himself commit on the stage or any part of the auditorium:-

(a) any profanity or impropriety of language;

(b) any indecency of dress, dance, movement or gesture;

(c) any offensive personation or representation of any individual;

(d) anything calculated or likely to excite feelings of sedition or political discontent;

(e) anything calculated or likely to cause riot or breach of peace, or to promote or excite hostile feelings between different classes, or to wound the religious feelings of any individual or class of individuals;

(f) any dangerous exhibition or display of a performance or games with wild beast, except in so far as it is an interim of performance in a Circus, which shall be governed by rules in Chapter XIII of these Rules.

(g) any performance or game involving risk, damage or danger to the audience or public;

(h) any speech, ceremony or any other item not covered expressly by the terms of the Performance Licence and by the script of the

performance for which the Performance Licence has been granted.

123. Acts prohibited by persons other than the holder of a Performance Licence and by others:

(a) any profanity or impropriety of language;

(b) any indecency of dress, dance, movement or gesture;

(c) any offensive personation or representation of any individual;

(d) anything calculated or likely to excite feelings of sedition or political discontent;

(e) anything calculated or likely to cause riot or breach of peace, or to promote or excite hostile feelings between different classes, or to wound the religious feelings of any individual or class of individuals;

(f) any dangerous exhibition or display of a performance or games with wild beast, except in so far as it is an interim of performance in a Circus, which shall be governed by rules in Chapter XIII of these Rules.

(g) any performance or game involving risk, damage or danger to the audience or public;

(h) any speech, ceremony or any other item not covered expressly by the terms of the Performance Licence and by the script of the performance for which the Performance Licence has been granted.

. The license issued can be revoked or suspended in terms of Section 162(2) of the Bombay Police Act, 1951 and the Rules framed thereunder for breach of the Act or Rules which have been reproduced earlier. The Rules and the condition of licence have been framed or imposed according to the petitioners in the interest of public safety and social welfare and if the aforesaid Rules are properly implemented, there cannot be any social problems such as indecent, obscene or vulgar behaviour or exploitation of women etc. which are cited as the reasons for introducing the impugned amendment. The bar owners are agreeable to pay the salary dues of an officer of the Respondents to ensure that the provisions of the Act, Rules and license conditions are not breached, in a like manner of posting an Excise Officer, where exciseable goods are stored.

82. Material placed by the State Government would

show that only 11 PL licence and 49 PPEL licences were cancelled. The figure of licenses suspended and/or warnings issued have been set out earlier. The nature of cases registered under the various Acts applicable were on the decline from 2000 to 2004. The number of licenses during that period of time was on the increase. The dancers danced to popular Hindi move tunes and imitated the dance steps movements of Hindi movie actresses. This has not been denied.In the matter of dress, the Rules of Performance License expressly prohibited indecency of dress, dance, movement or gesture as provided in Rule 122(b) and 123(b) framed under the Bombay Police Act. Whenever there were breaches prosecutions were launched. There is no material to show that there was nude dancing or that nudity was on display while the dancers danced. The licensing authorities had free access to the establishments and could have taken steps to suspend or cancel a licence for contravention of the Rules or license conditions for indecent dressing. In fact in some cases they have so done. In so far as conducting performance beyond prescribed time, as we have noted earlier, the State in fact has been increasing the timings. Again if there had been violation of the conditions of license their licences could have been cancelled. State's inaction is no answer when it involves deprivation of fundamental rights more so of carrying on profession or occupation for one's livelihood as the

restriction cannot be excessive.

. The most serious contention by the State was that the dance bars have become pick-up joints for prostitution. The State has produced a compilation of 34 cases under PITA from 2000 to 2005. That some of the women were involved in prostitution by itself would be no answer for the State to take away the right to livelihood of those others not so involved unless it was beyond the State's control. That is not the case considering the stand of the Home Minister in answer to the call attention motion and the number of cases filed. Cases for breach of conditions of licenses and under the Bombay Police Act for obscene and vulgar dancing have been registered under Sections 33(w) and Section 110 of the Bombay Police Act as also under the provisions of the Immoral Traffic (Prevention Act) 1956. Of the 10 case histories of girl children relied upon on behalf of the Commissioner of Police, one was of the year 2005 and the others are of 2004 or earlier. As noted earlier when the State seeks to prohibit or restrict a fundamental right, the burden is on the State to prove that the restrictions were reasonable and in public interest. As noted earlier, ladies working in the establishments are not merely dancers though dancers constitute a large proportion of those working in the establishments. It is not the State's case that those who serve the customers otherwise

than through dancing are not involved in immoral activities. If the argument of the State is to be accepted any establishment in the amusement and hospitality industries which has a large number of women or where women seek to earn livelihood by working in restaurants and other places or any profession of amusement and when they are open to gazes by men or increasing their lust would have the effect of women being exploited and/or being picked up. Every citizen of this country, male or female, has a right to earn his livelihood with dignity by carrying on a profession or occupation which is lawful and as long as the citizen abides by the law of the land. It is the duty of the State to provide protection to those lawfully engaged in an occupation or profession and not deprive them of their livelihood.

83. It has been submitted that the dance bars, constitute a threat to public order. The expression public order had come up for consideration before the Apex Court on several occasions.

. The issue in our opinion is no longer res integra having been considered by the Apex Court in several cases, more specifically in matters pertaining to preventive detention as under:-

"A person playing loud music in his own house

in the middle of the night may disturb public tranquillity, but he is not causing public disorder. 'Public order' no doubt also requires absence of disturbance of a state of serenity in society but it goes further. It means what the French designate order publique, defined as an absence of insurrection, riot, turbulence, or crimes of violence. The expression 'public order' includes absence of all acts which are a danger to the security of the state and also acts which are comprehended by the expression 'ordre publique' explained above but not acts which disturb only the serenity of others."

In **Dr. Ram Manohar Lohia v. State of Bihar, AIR 1966 SC 740** the expression of maintenance of public order was described thus:-

"One has to imagine three concentric circles. Law and order represents the largest circle within which is the next circle representing public order and the smallest circle represents the security of the State". All cases of disturbances of public tranquillity fall in the largest circle but some of them are outside 'public order' for the purpose of the phrase 'maintenance of public order', similarly every breach of public order is not

necessarily a case of an act likely to endanger the security of the State."

The restriction, therefore, must in the interest of 'public order'. Annoyance even if grave proportions does not bring the matter within the expression interest of public order.

Does the material relied upon by the State make out a case, that the manner of conducting places having bar dances, constitute a threat to public order. The case of the State as based on the affidavit filed by Waghmare can be summarised thus:- Complaints were received by wives relating to illicit relationship with bar dancers. This by itself cannot amount to a threat to public order considering the number of complaints which the State has produced on record. The bar girls had to suffer commercial exploitation and were forced into a situation that used to leave them with no other option than to continue in the indecent sector. It is true that there is material on record to show that many of those who perform dance in the prohibited establishments are young girls, a large section being less than 21 years of age and with only a primary education. Can that by itself be a ground to hold that they constitute a threat to public order. Can a girl who may be semi-literate or even illiterate who may be beautiful, knows to dance or tries to dance

prohibited from earning a better livelihood or should such a girl, because of poverty and want of literacy, be condemned to a life of only doing menial jobs? It is normal in the hospitality and tourist related industries to engage young girls. Inability of the State to provide employment or to take care of those women who had to take to the profession of dancing on account of being widowed, or failed marriages or poverty at home and/or the like cannot result in holding that their working for a livelihood by itself constitutes a threat to public order. There is no sufficient data to show that the women were forced into that profession and had no choice to leave it. It is then set out that in or around places where there are dance bars there are more instances of murder, firing, thefts, chain snatches and that public in general and women in the locality feel unsafe. In what manner dancing by women in dance bars results in increase in crime which would constitute a threat to public order atleast is not discernible. Inebriated men, whether in dance bars or other bars are a known source of nuisance. The State has not cancelled the liquor permits to remove the basic cause of the problem. Maintenance of law and order is the duty of the State. If drunk men fight or involve themselves in criminal activity, it cannot result in denying livelihood to those who make a living out of dance. It is not the case of the State that apart from these places, in the rest of

the State the same kind of offences do not take place. It is true that the State has produced on record that they have launched prosecutions in 2790 cases under Section 33(w) for cancellation of licences and 17403 cases have been registered under Section 110 of the Bombay Police Act. These are cases of incidents within the establishments and at the highest have been committed infront of an audience who have taken no objection to the dresses worn by the dancers or the kind of dancing. The public at large are not directly involved. In fact, as set out earlier, a learned Judge of this Court in **Girija Timappa Shetty vs. Assistant Commissioner of Police, 1997 (1) All M.R. 256**, has taken note of the fact that in order to inflate the figures, the Police would register separate case against every customer and employee present. Even otherwise we are unable to understand as to how, if there be a breach of Rule by an establishment, that would constitute a threat to public order. An illustration has been given of one Tarannum as having links with the underworld. At the time of hearing of this petition the Police had not even filed a charge sheet. Even otherwise a solitary case cannot constitute a threat to public order. It has also been pointed out that the Legislature has noted that the dance bars are used as meeting places for criminals. This defies logic, as to why criminals should meet at the dance bars where they could easily be noted by the police. Criminals,

we presume, meet secretly or stealthilly to avoid the police, unless they are confident that they can meet openly as the law enforcement itself has collapsed or they have friends amongst the enforcement officers. Even otherwise, how does a mere meeting of persons who are charged or accused for criminal offence constitute a threat to public order? Do not they meet in other places? It is then pointed out that the nature of business of dance bar is such that it is safe for criminals and immoral activities and this constitutes a serious threat to public order. The entire case of the State has been that it is only those dance activities which are associated with permit rooms and beer bars which are prohibited and that too in a class of establishments. In other words it is not dancing per se which results in criminal activities which constitutes a serious threat to public order but ..... type of dancing in places which have permit room or beer bar. Serving of liquor we presume is the basis of all evil that the State perceives, but that has not been banned and liquor continues to be served in the establishments, when there can still be performances like playing music by girls, singing by girls, girls being employed as waitresses and other incidental jobs. It was on the State to show that the dance bars were being conducted in the manner which was a threat to public order. The bars continue to operate with all activities except dancing. The State has been unable

to establish a nexus between dancing and threat to public order.

84. It is next contended that it was not possible to deal with the situation within the existing frame work under the prevailing laws. It was pointed out that though the State has initiated action under Section 294 of I.P.C. it was not possible to secure a conviction as the State had to prove obscenity and annoyance to customers. This by itself would indicate that the dance performance inside the premises are not lobscene or immoral as to cause annoyance amongst those who gathered to watch the performance. How that could cause annoyance to those who do not watch it or affect public order is not understood. It is like saying that watching a Hindi movie which has dance sequence and the dancers are skimpily dressed, would result in affecting public order. It is then submitted that though the Police were prompt in taking action under the prevailing enactments, the accused being successful in getting around the law and continued to indulge in the same activities again. Failure of the police to secure a conviction cannot be a valid ground to impose a restriction on a fundamental right. Apart from that the pronouncement of this Court under Section 294 would be the law. How can then the State still insist that the performance of dance was obscene or vulgar and caused annoyance to the public? If that

was so, they could have taken steps to cancel the performance licences.

. There is no material placed before us to show that it was not possible to deal with the situation within the framework of the existing laws except for the bare averments. The Regulation framed under Section 33(w) of the Bombay Police Act more so Regulation 238 and 242 provide that the licensing authority may suspend or cancel a licence for any breach of the license conditions. Regulation 241 empowers the licensing authority or any authorised Police Officer,not below the rank of Sub Inspector to direct the stoppage of any performance forthwith if the performance is found to be objectionable. Section 162 of the Bombay Police Act empowers a Competent Authority/Police Commissioner/District Magistrate to suspend or revoke a license for breach of its conditions. Thus there exists sufficient power. Exercise of that power does not require the initiation of any proceedings before a Court or judicial forum. No material has been placed on record to show whether the authorities so empowered at any point of time have taken any action. The State has also not been able to show that inspite of the powers conferred on the authorities why the dancers were allowed to perform dances which were indecent or gestures which were immoral as it was in their power. If the State had placed material to

show that they had taken all reasonable steps and inspite of that the activities continued, it would have been open to the Court to consider the argument in a different context.

85. We may now consider the argument based on the effect of directive principles. The argument is not based on Article 31-C of the Constitution, but on the basis, that an act which seeks to implement the directive principles contained in Part IV will make the 'restriction' reasonable and in the interest of general public. This principle has been accepted In **Pathummma & Ors. vs. State of Kerala AIR 1973 2 SCC 1** The Apex Court so understood it from the propositions as set out in the case of **His Holiness Kesavananda Bharati Sripadagalvaru vs. State of Kerala and Anr., (1973) 4 SCC 225**. Whilst considering the tests to examine whether the restriction is reasonable, the Court has to bear in mind the directive principles of State Policy. In so doing the Court must take intelligent care and deliberation in choosing the course which is dictated by reason and good conscience so as to strike a just balance between the freedom in the article and the social control permitted by the restrictions under the article. The Court must also bear in mind that there must be a direct and proximate nexus or a reasonable connection between the restriction imposed

and the object which is sought to be achieved. The message in Kesavananda Bharati is clear, that the interest of the citizen or a section of a community is secondary to the interest of the country or community as a whole. The restriction placed on any fundamental right in securing the directive principles will be held as reasonable, subject to the other limitations, namely that the Act does not run in clear conflict with the fundamental rights and secondly that it was within the legislative competence of the enacting Legislature. In the instant case the Respondent State has relied on Article 39-(e) and 39(f). Article 39(e) provides that the health and strength of workers, men and women, and the tender age of children are not abused and that citizens are not forced by economic necessity to enter avocations unsuited to their age or strength. Article 39(f) sets out that children are given opportunities and facilities to develop in a healthy manner and in conditions of freedom and dignity and that childhood and young are protected against exploitation and against moral and material abandonment. In the instant case in so far as children are concerned, if the report of Prayas is considered (which gives figures on the higher side) out of 72 persons interviewed, miner girls constituted 18%. By the very nature of licence minors could not have been employed and, therefore, it was in breach of the licence conditions. The

argument, therefore of invoking Article 39(f) is totally misplaced. In so far as health of men and women are concerned and tender age of children, again from the report of Prayas, dancers constitute 57% of the women interviewed and waiters 26% of the women interviewed and there was no information available of the balance 17%. We fail to understand as to how the object of the directive principles could be achieved by only prohibiting women from dancing, but not prohibiting women from serving in the permit room, liquor bar and eating house. On the other hand the study notes that the women workers in the dance bars come from poverty stricken or marginalised background. The findings are that before these women came to work in dance bars, 90% were either working in the villages or their present place of residence and were doing work like farming, zari work, domestic work, rolling beedies, etc. 90% of the women had family responsibilities. For the sustenance of their family, it became necessary for them to work and earn a livelihood. Of the women interviewed 68% were married, 21% were unmarried and about 11% information was not available. Amongst the married 33% were deserted, 8% were divorced and 6% were widows. 71% of the women had children who were undertaking primary or secondary education. They were worried about the education, health and day-to-day needs of their children. Their earnings ranged from Rs.50/- to Ras.500/- per day. Article 38 enjoins on the

State to secure a just social order for the promotion of welfare of the people, by striving to promote the welfare of the people by securing and protecting as effectively as it may be a social order, in which justice, social, economic and political, shall inform all the institutions of the national life. Article 41 enjoins upon the State within the limits of its economic capacity and development to make effective provision for securing the right to work, to education and to public assistance in cases of unemployment. If we examine, therefore, the argument advanced on behalf of the State based on the directive principles, in our opinion apart from the fact that the Statement of Objects and Reasons or Preamble make no reference thereto the women work in the dance bars because of economic necessity. They need to support their family and most of all to feed, clothe and educate their children, which the State is not able to provide. We must bear in mind that many of these women are widowed, deserted or divorced. They not only work as dancers, but also as waiters and other allied jobs in the prohibited establishments to earn a decent living for themselves and their families. That some may be exploited is no answer to prevent others from earning their livelihood by a vocation of their choice may be sometimes involuntarily. Under Article 51A(2), it is open to the State to enact legislation to prohibit the practices which are derogatory to women. That

does not mean that the State can take away the fundamental right of the bar dancers to dance, without producing material including scientific data. This the State has not done in the instant case. In our opinion, therefore, considering the tests laid down by the Apex Court considering the fundamental right to a profession or occupation, the directive principles really do not come into play on the facts of the case. If in fact, children are employed contrary to the Rules, the licensing authorities are duty bound to take severe action against such establishments including by way of cancelling the licenses.

. In so far as the bar owners are concerned, there is no material produced by the State to show as to why their establishments are singled out from having the same or similar dances which are permitted in the exempted establishments as also other establishments having Tamashas etc. The rules for licensing of dancing in the establishments are the same. The enforcing agencies are the same, and the punishment which can be imposed is also the same.

86. The other argument advanced on behalf of the State based on the affidavit and the report of Prayas is that there are elements of trafficking in the process of entry into the dance bar. It is submitted

that overwhelming material evidence indicates that the bar dancers have not adopted the profession out of choice, but have been forced or misled in the same by middlemen or other exploitative factors. The element of free and informed choice of adoption of a profession is absent. The activity of bar dancing is invariably harmful to the dancers and society and has its foundation in exploitation of women and the dancers cannot claim the said activity as a fundamental right. Such activity of dancing originates, exists and culminates in actions which are contrary to the constitutional mandates contained in Articles 19(2), 19(6), 23, 39(e) and 51A(e). The entire process of induction of young girls/women as bar dancer is a de-humanizing process and trafficking them into bar dancing completely lacks the element of conscious selection of a profession. At any rate it is set out that if the prohibition is not total and the dancer is skilled and professional, she can dance at any other place. The restrictions, therefore, are reasonable. Even assuming that the prohibition is total it is submitted that the State has produced sufficient material to justify the total prohibition in bars and permit rooms and the experience of past years shows that there is no other option. The Court must also bear in mind that recitals in the preamble and the SOR cannot be disputed and the Court must take the same to be correct. Reliance for that purpose is placed on Question 4, as formulated in

State of Gujarat vs. Mirzapur Moti Kureshi Kassab Jamat & Ors.(supra). The Apex Court there observed as under:-

> "The facts stated in the preamble and the Statement of Objects and Reasons appended to any legislation are evidence of the legislative judgment. They indicate the thought process of the elected representatives of the people and their cognizance of the prevalent state of affairs, impelling them to enact the law. These, therefore, constitute important factors which amongst others will be taken into consideration by the Court in judging the reasonableness of any restriction imposed on the fundamental rights of the individuals. The Court would begin with a presumption of reasonability of the restriction, more so when the facts stated in the Statement of Objects and Reasons and the preamble are taken to be correct and they justify the enactment of law for the purpose sought to be achieved."

It is further submitted that from the material on record, the overwhelming number of dancers are illiterate, poverty stricken women, of very tender age, who are driven to dancing in bars. As there is

no professional skill involved in bar dancing, the bar dancers are capable of seeking employment in other unskilled jobs. Apart from that, it is submitted that there is no fundamental right to carry on an occupation by insisting on working in a particular establishment or a series of establishments. The further submission advanced is that the State action is to defend the weaker section from social injustice and all forms of exploitation. The Coalition Against Trafficking in Women(CATW) in a presentation titled "Prostitution: A Contemporary Form of Slavery - CATAW presentation to the United Nations Working Group on Contemporary Forms of Slavery, Author Dorchen Leidholdt, Co-Executive Director of CATW wrote as under:-

> "The focus of our work is on sexual exploitation, which we define as the sexual violation of a person's human dignity, equality, and physical or mental integrity and as s practice by which some people (primarily me) achieve power and domination over others (primarily women and children) for the purpose of sexual gratification, financial gain, and or advancement....."

. No explanation is given as to why it amounts to trafficking only for dancers and not other forms of work by the women, like waitress, singers and

other jobs. The State did not conduct any study in support of the argument that there were elements of trafficking. Though the State has launched various prosecutions, no material has been brought on record from those cases that the women working in the bars were forced or lured into working in the bars and there was no voluntariness and that they were sent back to their villages or homes or from where they have been lured on their complaints or complaints of N.G.Os. or concerned citizens. The statement of Objects and Reasons and the Preamble also does not so indicate. The large number of N.G.O.s who are Petitioenrs before this court would indicate otherwise. It is only in the report of Prayas which conducted the study, after the Government had taken decision to ban, that there is some reference to trafficking. To support the charge of trafficking in order to prohibit or restrict the exercise of a fundamental right, the State had to place reliable material which was available when the amending Act was enacted or even thereafter to justify it. A Constitutional Court in considering an act directly affecting the fundamental rights of citizens, has to look beyond narrow confines to ensure protection of those rights. The State to restrict or prohibit these rights must produce sufficient material justifying its action. In answer to the call attention Motion, an admission was made by the Home Minister and it is also stated in the statement of

Objects and Reasons that young girls were going to the dance bars because of the easy money they earned and that resulted also in immoral activities. There was no mention of trafficking. No case of trafficking has been established.

87. Is the restriction in the interest of general public?. **In Municipal Corporation of City of Ahmedabad and others vs. Jan Mohammed Usmanbhai and Another AIR 1986 SC 1205** the expression in the interest of general public was considered and this is how what the Apex Court expressed itself:-

> "The expression "in the interest of general public" is of wide import comprehending public order, public health, public security, morals, economic welfare of the community and the objects mentioned in Part IV of the Constitution. Nobody can dispute a law providing for basic amenities; for the dignity of human labour like provision for canteen, rest rooms, facilities for drinking water, latrines and urinals etc. as a social welfare measure in the interest of general public. Likewise in respect of legislations and notifications concerning the wages, working conditions or the other amenities for the working class, the Courts have adopted a liberal attitude and the interest of the

workers has been protected notwithstanding the hardship that might be caused to the employers."

We have earlier discussed most of these tests, and the material on which the State has placed reliance which are (i)The report of Chapekar, Prayas and S.N.D.T. University (ii) International Convention and Directive Principles; (iii) The Statement of Objects and Reasons and the Preamble (iv) Complaints made by members of the House in answer to the call attention motion and the complaints received from the general public and (v) Affidavit of Waghmare. We have expressly dealt with each of the arguments earlier. We also proceeded on the footing that there is a presumption as to the constitutionality of the Statute and that the Legislature best knows the interest of the people. For that purpose the Statement of Objects and Reasons are evidence of the Legislative judgment. In the instant case it was the unanimous view of the House which resulted in the legislation.

88. Can it be said that the Legislation is in the interest of the general public or is it excessive and goes much beyond that? There is no general or fixed test or exact definition and that has to be considered on the facts of each case. The Court must strike a just balance between the restrictions

imposed and social control. The Court must also note prevailing social values which are sought to be protected or restricted. The Court must also bear in mind that there must be a direct and proximate nexus or a reasonable connection between the restriction imposed and the object which is sought to be achieved. If there be a nexus with the object then in that event there will be a strong presumption in favour of the constitutionality. The judicial approach must be dynamic and elastic. The restriction should not be arbitrary, and/or excessive. As we have noted earlier the object of the Legislation was prohibition of dances which were obscene or vulgar which amounted to derogation of women and also to prevent exploitation of women. That being the object can the restriction be said to be in the interest of hte general public? Women can still dance in the exempted establishments, women can still participate in Tamashas and Lavanis. Women can still work as waiters or any other allied jobs in the prohibited establishments. Owners of the establishments are not prohibited from engaging women other than for dancing. Women continue to be so engaged. Those women come from the same strata of society from which the dancers come. The only distinguishing feature perhaps is their complexion and dancing abilities. There is no other independent material to show otherwise. The report of Chapekar, S.N.D.T. and Prayas all deal with these women styled

as bar dancers as a class. In other words there is no nexus between the banning of dancing in the prohibited establishments and the object of prevention of exploitation as women, who continue to be engaged in those establishments. To prevent dances which are obscene or vulgar there are Rules in force. The dances are within enclosed premises. The general public have no access. The Home Minister himself admitted that the Police force in Mumbai was sufficient to control the dance bars. Eating houses, beer bars or permit rooms are granted licenses only after they satisfy the requirement of law, and in permitted localities. Assuming that there may have been bad practices in the dance bars, the State itself had directed enacting of subordinate legislation, to remove the bad practices. These dances which are held to be a class by themselves and could be prohibited, there is no reason as to why similar dances which are permitted in the exempted establishments can not be permitted, as hte prohibited establishments are still entitled to obtain a performance licence. The restriction therefore, has no rational nexus with the object of the Act. They cannot be said to be in public interest.

89. For all the aforesaid reasons, we find that the restriction imposed can not be said to be reasonable or in the interest of the general public. Hence,

Section 33A of the Bombay Police Act is violative of Article 19(1)(g) of the Constitution of India and consequently, we declare Section 33A as void.

90. **Should the investigation be referred to the Central Bureau of Investigation, as it involves the Deputy Chief Minister and Home Minister of the State.**

. The petitioners in Criminal Writ Petition No.1971 of 2005 have added as Respondent Shri R.R. Patil, Deputy Chief Minister and Home Minister of Maharashtra as also, one Shri Vilas Satam, Vice President of the Nationalist Congress Party, Kurla Branch Mumbai and one Shri Paresh Patil. The reliefs which the petitioners have sought, is to direct the respondent No.8, the Commissioner of Police to hand over the case papers of investigation to the Central Bureau of Investigation, New Delhi which is the respondent No.7 with a further direction to register offence against Shri R.R.Patil, Shri Vilas Satam and Shri Paresh Patil and to carry out further investigation in regard to the demand of gratification of Rs.12.00 crores and complete the same within a specified time limit. In support of the prayer clause, it is alleged that the Deputy Chief Minister had made demand of illegal gratification to the tune of Rs.12.00 crore through his men in order not to ban dance bars. The President of the Petitioner Association, had made a

public accusation which was telecast on electronic media. The petitioners were approached by Vilas Satam along with Paresh Patil who had negotiated on behalf of the Deputy Chief Minister. Vilas Satam had met the President of the petitioner Association at his dance bar-Karishma Dance Bar at Dadar some time in December, 2004. Vilas Satam was accompanied by Yeshwant Shetty, owner of Priya Dance Bar. Vilas Satam had taken the petitioner to Paresh Patil who had a separate cabin in the office of Nationalist Congress Party at Nariman Point. Paresh Patil had informed the President of the petitioner that he had discussed the issue with the Deputy Chief Minister who had agreed to extend the time to close dance bars from 1.30 a.m. to 3.30 a.m. provided the Association would pay Rs.12.00 crores to the Deputy Chief Minister and Rs.1.00 crore for himself. After the broadcast of his interview the Deputy Commissioner of Police, Zone V, Worli, called the petitioner in his office on 11th May, 2005. The President of the Petitioner Association had appeared before the Deputy Commissioner on 11th May, 2005 and had given all details regarding the negotiations that had taken place between himself and Shri Vilas Satam and Paresh Patil. The statement of the President of the petitioner was recorded. The Deputy Commissioner of Police, Zone V, Worli, instead of registering crime against Shri R.R.Patil, wanted to register a case against Shri Vilas Satam and Paresh Patil who

were acting as agents of Shri R.R.Patil. A breach of privilege was tabled against the President of the petitioners in the Maharashtra Assembly on 31st March, 2005 and contempt proceedings were initiated. The matter was referred to the Privilege Committee along with the news item. An explanation was called for. In the reply filed the contents of the news item were denied. It is because of the disclosure by the President, that the Deputy Chief Minister was demanding Rs.12.00 crore as illegal gratification, the Deputy Chief Minister took a vow to close down the dance bars. Inspite of public outcry no case has been registered. It is set out that as the case involves Deputy Chief Minister and Home Minister of the State, the Police Authorities are taking no steps as the investigating agency is under the Home Minister. The demand, it is set out, would constitute an offence under the provisions of Prevention of Corruption Act and in these circumstances the case to be handed over to the C.B.I. The specific charge which the President of the Petitioner Association has made is that Shri R.R.Patil, the Home Minister through Vilas Satam and Shri Paresh Patil had demanded a sum of Rs.12.00 crores for extending the time of the dance bars from 2.30 a.m. to 3.30 a.m. As the charge is against the Home Minister no Police Officer would dare to register offence against the Home Minister and arrest him.

90. Shri R.R. Patil, the Deputy Chief Minister has filed a reply, dealing specifically with the allegations levelled by the President of the petitioners Shri Manjeetsingh Sethi. It is set out that the Court has no jurisdiction to order a C.B.I. enquiry and assuming that there is power to order such enquiry this is not a fit case in which C.B.I. enquiry should be ordered. If the case of Shri Sethi himself is considered it will be apparent that Shri Sethi has admitted that the contesting respondent had not met him, nor spoken to him on phone or otherwise in connection with the allegations contained in the petition. A close analysis of the various statements made by Sethi would show that the story is unbelievable and that the respondent No.4 is being falsely implicated. It is specifically denied that any gratification of Rs.12.00 crores or any other amount was sought by the respondent No.4, through his men as alleged or otherwise. The statement by Sethi was made on 30th March, 2005 at about 13 hours.The respondent No.4, it is set out, had announced the intention to ban dance bars outside Mumbai on 15th February, 2005 in Pune. The same was announced on the Floor of the House on 30th March, 2005. Regarding the allegation against Paresh Patil and Vilas Satam, that the negotiations on behalf of the Respondent has been specifically denied. It is also specifically denied that either Vilas Satam or Paresh

Patil were acting as his agents. The Respondent has pleaded that he is not aware of the statement made by Yeshwant Shetty and that the statement of Sethi or Shetty discloses no ingredients of offence under any provisions of the Prevention of Corruption Act, 1988. There was a demand for banning the activity in Mumbai by political parties, N.G.Os. as also citizens and also Editorials in newspapers. It is also pointed out that complaints had been received against Satam by the respondent No.4 on 17th March, 2005. The N.C.P. was asked to take action against Satam. Thereafter Satam was expelled. Shri Satam, it was pointed out, was arrested in respect of the complaint received by the respondent No.4. It is denied that no action has been taken. It is also denied that the reason for amending the Bombay Police Act was on account of the influence exerted by lobby of clubs or gymkhanas, discotheques or pubs or hotels above three stars. It is also set out that the respondent No.4 had not received any application dated 2nd February, 2000 or of any other date in his office based on the incident nor is he aware of the application. Exhibit "D" would indicate that the letter was delivered to Shri Paresh Patil and not in the office of the respondent No.4. Various other allegations have been denied.

. Paresh Patil has also filed an affidavit denying the allegations and has set out that he is

not involved with the activities of the Nationalist Congress Party or N.C.P. workers or that he was acting as agent of Shri R.R.Patil. It is also denied that he had a separate cabin in the office of the Nationalist Congress Party at Nariman Point, Mumbai.

. The petitioners through their President has filed rejoinder to the reply filed by respondent NO.4. It is set out that considering the reply filed by respondent No.4 an enquiry in respect of the allegations made by him are pending with the 8th Respondent. It is pointed out that no offence can be enquired or investigated without a crime being registered against a person.

91. Learned Counsel for the parties have advanced various arguments and have relied upon various authorities. At this stage it may not be necessary for this Court to consider the arguments and or deal with the authorities cited. On behalf of the Commissioner of Police their learned Counsel has made available to the Court the investigation papers and has also submitted that investigation is on. In the absence of a case being disclosed, it is pointed out that no case can be registered. A notice was sent to the Petitioner by the Deputy Commissioner of Police, Zone V, Worli, Mumbai dated 10th February, 2005. Sethi's statement was recorded. Shri Sethi was shown the daily Lokmat.Sethi's statement as recorded is

that the news item to the extent that it is reported, that Shri Vilas Satam and Paresh Patil had demanded Rs.12.00 crores from him for canceling the order regarding closure of dance bars is false, but the demand was made for extending timing of dance bars by two hours. In December, 2004 Vilas Satam had come to him at his bar and given his his visiting card. He was accompanied by Shri Yeshwant Shetty, the owner of Priya Bar at Byculla. Shri Satam put a proposal that licence of all establishments within the limits of Greater Bombay Municipal Corporation are going to be cancelled under the orders of the Government. As such dance bars which are presently required to be closed at 1.30 hours can be run upto 3.30 hours. If the Association was interested in getting the work done he knew some persons close to Home Minister Shri R.R.Patil and could get the work done through them. Eight days thereafter Shri Satam came to meet him at Karishma Bar and then took him to the office of the Nationalist Congress Party where he was introduced to Shri Paresh Patil, who had a separate cabin there. He was informed by Shri Patil that he was doing the work of interior designing of the office of the Nationalist Congress Party. Shri Satam put a proposal for extending time of running of dance bars by two hours and Shri Paresh Patil showed his willingness to get the work done and stated that he would arrange a meeting with the Home Minister. Satam thereafter on 15th January, 2005 called him on

his mobile and set out that Paresh Patil had spoken to Respondent No.4 stating that the work had been done and gave the phone to Paresh Patil. Shri Paresh Patil told him that the work could certainly be done and that the subject matter of money could not be discussed on phone and told him to meet him personally in the office. On the next date at 9.00 hours he met Paresh Patil when he was told that he would have to pay Rs.12.00 crores to the Home Minister Shri R.R.Patil and Rs.1.00 crore for himself. Shri Sethi informed Paresh Patil that he would hand over the amount of Rs.12.00 crores personally to Shri R.R.Patil, Shri Paresh Patil gave him two mobile numbers. Shri Satam again met him after three days and asked for a proposal on the letter head of the Association. As it was late he had handed over 8-10 letterheads and asked to type appropriate proposal and he would sign it. Shri Satam came on the next day with the proposal typed in Marathi on the letter heads which were addressed to Respondent No.4-Shri R.R.Patil and Shri Jayant Patil, Revenue Minister. He signed the same and returned them to Vilas Satam. He was in contact with Paresh Patil, who assured him that the work is being done. On 2nd February, 2005 they decided to meet at Regency Hotel at 9.30 p.m. They met outside the hotel when Satam informed him that the proposal which was submitted was faulty and to submit the proposal in English on the same day incorporating therein the

actual number of dance bars with the number of persons who would get employment by reason of the proposal and the proposal in English was prepared and sent through his driver to Paresh Patil at 11.30 p.m. outside Regency Hotel. The various discussions thereafter have been set out and then he was informed by Paresh Patil on 31st March, 2003 that the meeting could be possible with Shri R.R.Patil after Assembly Session. In the meantime Shri Patil declared in the Assembly that the dance bars outside Mumbai would be closed. At that time they did not speak to the Press, but gave the information thereafter. He has also stated that he has not met the Home Minister till date and that Shri R.R.Patil has not demanded Rs.12.00 crores for the proposal. However, Shri Paresh Patil had demanded Rs.1.00 crore for himself and Rs.12.00 crore in the name of Shri R.R.Patil.

92. It is not for this Court at this stage to go into the veracity of the complaint and/or its genuiness considering that the matter is still under investigation. The allegation, if true, reflects a sorry state of perversion of constitutional principles and philosophy. It demonstrates that businessmen have no hesitation in giving bribes for obtaining their objective and those entrusted with the law making authority using it to make money for themselves. In the instant case the President of the Petitioner Association was willing on behalf of the

Association to pay a large amount unlawfully to interfere in the exercise of a subordinate legislative action, at the instance of those who claim were close to Respondent No.4 for changing the timings of the dance bars upto 3.30 a.m. If true, it indeed would be a sad day for this Republic and the faith that millions have in the Constitution and the law. That the law can be amended, bent or altered for a consideration is a crime that no civilised society can accept. Our observation, however, does not in any way reflect on the facts of the present case. If the statement of Sethi is considered it is his own case that the respondent No.4 R.R. Patil,the Home Minister has never demanded any amount from him nor has he met him. The entire exercise had been at the highest done by Shri Satam and Shri Paresh Patil. There is prima facie material to indicate on the record as it stands, that Shri Satam and Shri Paresh Patil were involved in contacting the President of the Association to pay a large sum to change the timings of the dance bars. The letter addressed by the petitioner was not only to respondent No.4, the Home Minister but also to Shri Jayant Patil, the Revenue Minister. In our opinion on these facts it is not necessary for us to go into the various arguments advanced, as to what amounts to an investigation and when can it be said that the investigation is in progress. We are of the opinion that the petitioners have failed to make out any

prima facie case for referring the matter to the C.B.I. We, however, direct the Respondent No.8 to take further steps to investigate and record any further statements, if not recorded, and thereafter to proceed according to law at the earliest. A report be filed before the Court within three months from today as to whether ingredients, of any offence have been made out and if so steps that they have taken in the matter. We may at this stage record the submission made on behalf of the Police Commissioner that the investigation atleast when the matter was argued before this Court did not disclose any criminal offence against Respondent No.4. The prayer, therefore, as sought for by the petitioner in Criminal Writ Petition No.1971 of 2005 cannot be granted.

93. CONCLUSIONS : I therefore, hold :

(1) Maharashtra Act No. 35 of 2005 is within the competence of the State Legislature. The Amending Act is also not repugnant to the Law made by Parliament.

(2) The Proviso to Section 33A(2) does not interfere with the independence of the judiciary.

(3) The Amending Act applies to those establishments having a licence for a eating house permit room or beer bar. As the Eating Houses is included within the definition "Place of public entertainment", the Act covers, establishments which are the subject matter of the present Petition.

(4) Section 33A, is not violative of Article 15 of the Constitution of India in as much as it does not discriminate against women.

(5) The Amending Act does not amount to an unreasonable restriction on the freedom of speech and expression. The predominant activity carried out in the place of public entertainment, is of carrying on trade or business, occupation or profession. Applying the doctrine of pith and substance and on the facts of the case there is no violation of the freedom of speech and expression.

(6) The Amending Act also does not violate the dancer's or bar owner's right to life under Article 21, as the bar owner continues to carry on business except dancing in the licenced premises and the dancer is only restricted from carrying on dancing in the prohibited establishment. They can however, dance elsewhere.

(7) The prohibited establishments and the exempted

establishments, though both have licences, for a place of public entertainment and performance licences, constitute two distinct classes, as the dances which are restricted in the prohibited establishments, have distinct traits and characteristics of their own.

. However, considering that the object of the Legislation is to prevent dances which are obscene, vulgar or immoral and hence derogatory to the dignity of women and to prevent exploitation of women, we find that there is no nexus between the classification and the object of the Act. The Act bans all dancing including the dances which are permitted in the exempted establishments and which are governed by the same rules and conditions of licence. If women other than as dancers can work in the prohibited establishments and that does not amount to exploitation, we do not see as to why when women dance to earn their livelihood, it becomes exploitation. Section 33A and consequently Section 33B are void.

(8) The Amending Act does not amount to prohibition but is a restriction within the meaning of Article 19(6) of the Constitution of India. The restriction in so far as it prevents the bar owners from having the same or similar dances as in the exempted establishments and the bar dancers from performing

dances other than those which can be restricted, is unreasonable and not in public interest and consequently void.

(9) In the matter of the relief sought for referring the matter for investigation to C.B.I. we find that no prima facie case is presently disclosed against the Dy. Chief Minister and Home Minister, Respondent No. 4. We however, prima facie find that Shri. Vilas Satam and Paresh Patil were dealing with Shri. Manjit Singh to get the Law amended for change of timings of dance bars for a huge consideration. We therefore, direct Respondent No. 8, the Commissioner of Police, Mumbai to continue with the ongoing investigation and file a report with this Court within the period of three months from today on the outcome of the investigation.

94. Rule therefore, made absolute in terms of Conclusions 7, 8 and 9. In the circumstances of the case, there shall be no order as to costs.

**(F.I. REBELLO,J.)**

**Per Mrs. Roshan Dalvi, J**. :

95. I concur.

. The fundamental rights of citizens are paramount. Though, therefore, the bar dancers as well as the bar owners are entitled to carry on their trade and profession, it can only be subject to their contracting within the parameters of law.

. The two reports of the two reputed NGOs - PRAYAS, Dept. of Criminology and Correctional Administration of the Tata Institute of Social Sciences and the Research Centre for Women's studies of the SNDT University show that some bar dancers are minors, albeit a small percentage, hailing from different States.

. Though the State has not shown actual trafficking of these children, if any children are indeed found serving in any dance bars, it would be in a place undesirable and unsuitable to their age.

. None other than Mahatma Gandhi had said :

> "I hold that the more helpless a creature, the more entitled it is to protection of men from the cruelty of men."

. Though the mere entry of a small percentage of

such children in the vocation unsuitable to their age and aptitude cannot justify upholding of the impugned legislation, I would consider myself failing in my duty if I let the fact pass undirected.

. The State has filed an affidavit showing its desire to rehabilitate the dancers if they lose their present contract/employment in the bars. The NGOs have interviewed the dancers. The report relied upon by the State shows the constraint of some to the dancers to enter the profession only on account of economic need. The bar owners have denied the fact of any minor being brought into any bars as dancers.They have, through their counsel Ms. Veena Thadani, made an oral statement to Court that they would never permit a single child to be abused in their premises. The said statement is accepted.

. Extensive directions are given by the Apex Court in the best interest of children of fallen women in Gaurav Jain v. Union of India, 1997 (8) SCC 114 considering various fundamental rights as well as directive principles of state policy in the Constitution of India as well as various International Covenants ratified by India.

. In view of the above, and by way of abundant caution, a modicum of supervision and inquiry would be required to be made at certain intervals of time.

This can best be made by either of the NGOs who have filed their report, both of whom are reputed NGOs beyond reproach.

. PRAYAS of TISS and SNDT University are accordingly directed to undertake, inquire and make Environmental Study Report of any dance bar at any time on the request of the State or any party or of their own motion by interviewing any dancers, including any child employed or otherwise serving in any of the dance bars in the State of Maharashtra. If their inquiry shows any illegal employment of, or contract with, any minor they shall report the fact to the relevant police station for action against the bar owner and take whatever steps that are necessary for the rescue and rehabilitation or repatriation of those children.

. The parties shall provide a copy of this judgment to the respective NGOs whose report is relied upon by them.

**(MRS.ROSHAN DALVI,J.)**